

Extending the Protection of Geographical Indications

Case Studies of Agricultural
Products in Africa

Edited by
**Michael Blakeney,
Thierry Coulet,
Getachew Mengistie and
Marcelin Tonye Mahop**



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EXTENDING THE PROTECTION OF GEOGRAPHICAL INDICATIONS

The TRIPS Agreement (for trade-related intellectual property rights) provides for the general protection of geographical indications (GIs) of product origin, including for example the special protection of wines and spirits and for the creation of a multilateral register for wines. The African Group of countries has been in the forefront of countries agitating in the World Trade Organization TRIPS Council for the extension of this special protection and of the multilateral register to industries which are of interest to developing countries, primarily agriculture. The so-called 'extension question' is the central feature of the Doha Development Agenda at both the WTO and World Intellectual Property Organization.

This book provides some empirical evidence and applied legal and economic reasoning to this debate. It provides both a general review of the key issues and a series of case studies from seven Anglophone and five Francophone countries in Africa. These focus on major agricultural commodities such as coffee, cotton, cocoa and tea, as well as more specific and local products such as Argan oil and Oku white honey.

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FOREWORD

The use of geographical indications as one of the intellectual property tools used in the marketing of agricultural products and wines and spirits has a long history in Europe. By this means, producers have gathered together in collectives to set and maintain product quality standards and to engage in the joint marketing of their products to secure premium prices. An incidental effect of the establishment of artisanal niche markets is also to maintain rural employment and the preservation of rural landscapes.

Geographical indications are a subject of protection in the TRIPS Agreement and in the Lisbon Agreement administered by WIPO. The TRIPS Agreement provides for the 'additional protection' of wines and spirits and for the establishment of a multilateral system for the registration of geographical indications used in relation to wines and spirits. The African Group of countries has argued that there is no logical reason why the privileged position for wines and spirits should not be extended to other products such as agricultural products and handicrafts. Missing from this debate has been any resort to empirical data concerning the potential in African countries concerning the use of geographical indications to protect their products.

The editors of this book have collaborated in an EU-ACP project to generate empirical evidence at country and product level to support African ACP country engagement in the Doha Round negotiations. The book locates this analysis not only within the context of the 'extension debate', but also within the context of economic and development analyses. It also considers the extent to which geographical indications can be used as a means to protect traditional knowledge and expressions of culture. The editors undertook case studies in Cameroon, Gabon, Ghana, Kenya, Mauritius, Nigeria, Rwanda, Senegal and Tanzania, developing a methodology which is intended to be used in other ACP countries.

Development assistance is typically characterized by similar activities by a number of donor agencies. This book attempts to bring together a number of these efforts in

the African region. It reports the results of case studies undertaken by WIPO in Ethiopia and Uganda and also case studies undertaken on behalf of the Swiss National Centre of National Competence in Research (NCCR) in Morocco and South Africa. It thus provides a useful corpus of evidence to inform the discussions about the potential for geographical indications in the African region.

An interesting feature of the book is that the contributors come from the disciplines of agricultural economics, law, economics and biology. This is particularly useful in an area which has hitherto largely been dominated by a legal discourse.

The editors are to be commended for their multi-disciplinary initiative. This book will be essential reading for trade negotiators and all of those interested in the way that intellectual property tools can be used to promote economic development.

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INTRODUCTION

This book arose out of the collaboration of the editors in an ACP-EU project: ‘The protection of Geographical Indications (GI): Generating Empirical Evidence at Country and Product Level to Support African ACP Country Engagement in the Doha Round Negotiations’. The overall objective of the project was to generate empirical evidence, based on country/sub-regional and product case studies, regarding the benefits that African members of the ACP Group can obtain from enhanced multilateral Geographical Indication (GI) protection. Among the specific objectives of the project were: (i) an assessment of the suitability of existing international GI protection regimes for the effective protection of African GIs and provision of recommendations for needed changes; (ii) the establishment of a replicable methodology for use in Africa and other ACP regions for analysing the dynamics of capturing economic value from GIs; (iii) evaluation of access to GI-protected products by local populations; (iv) an evaluation of the role of governments in the GI framework; (v) an exploration of the costs of establishing and administering a GI regime in a country and the costs of developing, registering and enforcing individual GIs; and (vi) recommendations on the optimum international framework to enable African countries to capture value out of GIs.

Another result of the project was the identification of 10–15 economically significant (ACP-based) African products with the greatest potential to benefit from GI protection. The primary source for the identification of these products was the industrial property offices of the respective countries.

The empirical work on the project was undertaken through the administration of questionnaires to: (i) organizations of producers, processors, distributors and exporters and other qualified experts of the products surveyed and its markets; and (ii) IP bodies and public administrations in countries with existing GI regimes and countries with trade mark regimes in countries with products with potential for GIs protection.

2 Introduction

The principal products surveyed under the project were:

CAMEROON: Oku White Honey

GABON: Okoumé Wood

GHANA: Cocoa

KENYA: Tea

MAURITIUS: Demerara Sugar

NIGERIA: Yams

RWANDA: Coffee

SENEGAL: Yett of Joal

TANZANIA: Cloves

Other possibilities for GIs protection were also identified. The data collected from these case studies has been utilized in this book. On 9 and 10 May 2011 a conference entitled 'Protection of ACP Geographical Indications' was held at the WTO in Geneva. The conference was structured around several of the case studies discussed in Part 2 below. A Peer Review of the project was undertaken by Delphine Marie-Vivien and Didier Chabrol, Researchers at Cirad, UMR Innovation in Montpellier and by Audrey Aubard. The case studies below reflect a number of the observations of the reviewers. Dr Aubard has contributed Chapter 2 on setting up a GI and the requirements and difficulties at the producer level. This practical question had not been a focus of the project, which was more concerned by the issue of the extension of GIs protection under TRIPS.

Of course there have been a number of other projects undertaken to explore the potential of GIs in African countries. WIPO's Committee on Development and Intellectual Property initiated a 'Project on Intellectual Property and Socio-Economic Development' to conduct studies on the protection of intellectual property and to identify the possible links and impacts between IP and development. Among those projects which have been initiated are needs evaluation and technical support for the development of a sectoral IP development strategy to enhance the competitiveness of the cotton and clove sectors in Uganda and Zanzibar. The GIs aspects of these have informed the case studies on those industries in Chapters 7–18, as has a study commissioned by WIPO on the Ethiopian Fine Coffees initiative. Evaluations of potential Kenyan GIs were conducted in the context of the 2009 Swiss-Kenyan Project on GIs and this book considers a number of the findings of that project.

Finally, in 2009 two researchers from the Institute for Environmental Decisions (IED), Agricultural Economics Agri-food and Agri-environmental Economics Group at ETH Zurich, undertook seven case studies of GIs in various parts of the world (El Benni and Révion, 2009). Their case studies on Argan Oil in Morocco and Rooibos Tea in South Africa have been reworked for this book. It was particularly important to include the Moroccan case study, as that country is the first in Africa to have registered GIs for its products. Research for their case studies was funded by the Swiss National Science Foundation under a grant to the National Centre of

Competence in Research on Trade Regulation, based at the World Trade Institute of the University of Bern, Switzerland.

The book is divided into two parts. The first part deals with the legal, economic and developmental context within which these case studies were undertaken.

Chapter 1 addresses the protection of GIs under the TRIPS Agreement and the substance of the extension debate. Chapter 3 looks at the international, regional and national legal infrastructure within which GIs are protected in Africa. Chapter 4 then seeks to locate the issue of GIs within the context of the economic development debate and builds upon the work which its authors have undertaken on the role of IP in the economic development of Sub-Saharan African countries and on the construction of an IP policy capacity in those countries (Blakeney and Mengistie 2011a and 2011b). In Chapter 5, Thierry Coulet briefly synthesizes of the economic theory of GIs and then proposes a pragmatic methodology for assessing the potential economic impact of a GI protection. He identifies the major benefits and costs that are most usually attributed to a GI protection and details the quantitative and qualitative methods that can be implemented in order to assess these benefits and costs.

Although the primary focus of the book is the use of GIs to protect agricultural products in Africa, a number of the national case studies threw up the potential application of GIs to protect traditional cultural expressions (TCEs) and traditional knowledge (TK) in African handicrafts, as well as in agricultural products. Indeed, the submissions of the African Group of countries in the extension debates in the TRIPS Council have included handicrafts, with agriculture as a beneficiary of the extension of the additional protection enjoyed by wines and spirits. Chapter 6 considers this possibility, particularly since the debates on the protection of TK and TCEs, either within the TRIPS Agreement, or as a form of *sui generis* protection promulgated by WIPO, have been long drawn out (Blakeney 2009).

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Part I

The Policy Context

1

GEOGRAPHICAL INDICATIONS AND TRIPS

Michael Blakeney

Introduction

Article 22 of the TRIPS Agreement requires that WTO members ‘shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).’ It would be convenient to hypothesise that the origins of the precursor European legislation that sought to protect the commercial reputation of traders in discrete geographical localities was actuated by a concern to protect consumers from false and misleading geographical indications (GIs). However, the origin of GI legislation can be traced back to French statutes to protect the competitive advantage of wine producers (see Richard 1918, referred to in van Caenegem 2003). The mediaeval legislation of Bordeaux conferred two privileges upon the wine producers of south-west France. First, the *privilège de la descente* prohibited the transportation by river through Bordeaux of wines produced outside the region until 11 November of each year. With the icing up of rivers consequential upon the onset of winter, this gave the local wines a competitive advantage in gaining access to the lucrative Northern Europe markets. The justification for this restriction was stated to be to provide an opportunity for the authentication of the wines of the region. As will be seen below, a similar duality exists in relation to the modern justification of geographical indications laws in which a concern with the authentication of the origin of products cohabits with a concern to preserve the competitive advantage of local producers.

The second category of privilege was the *privilege de la barrique*, which restricted for use only for the wines of Bordeaux a barrel (barrique) of prescribed dimensions, which meant that wines from the region were better packaged and travelled cheaper

than wines from competing regions. By a statute of 1764 seeking to prevent the illicit use of the Bordeaux barrique, each had to be branded with the name and parish of origin of the wine grower.¹ The barrique brand can be seen as a precursor of the registered GI.

In seeking to resist the abolition of its commercial privileges at the time of the French Revolution, Bordeaux raised a number of the arguments that have characterized the modern debate on geographical indications. First, it argued that the privileges were essential for guaranteeing the authenticity of the crus (vintages) and, second, that as the land of the region was not suitable for other agricultural pursuits, viticulture had to be protected through the maintenance of these privileges.

Interestingly, echoes of the ancient privileges enjoyed by the French wine industry can be seen in Article 23 of the TRIPS Agreement. This provides in Article 23.1 for 'the additional protection for geographical indications for wines and spirits' through the prohibition of 'expressions such as "kind", "type", "style", "imitation" or the like' for wines and spirits not originating in the place indicated by the GI. Article 23.4 provides that in order to facilitate the protection of GIs for wines, negotiations shall be undertaken in the Council for TRIPS 'concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system'. This book addresses the question of whether the additional protection for wines and spirits envisaged in Article 23 of TRIPS might be extended to other products. This extension debate has been occurring in the context of discussions concerning the establishment of the multilateral system of notification and registration, as well as within the negotiations envisaged within Article 24.1 of TRIPS that are 'aimed at increasing the protection of individual geographical indications under Article 23'.

Definitions

Geographical indications

Because of the diverse ways in which the protection of geographical indications has evolved under national laws, there is no generally accepted terminology. The following are the conventional definitions which can be found in the literature on geographical indications:

'Indication of Source' refers to a sign that indicates that a product originates in a specific geographical region.

'Appellation of Origin' refers to a sign that indicates that a product originates in a specific geographic region only when the characteristic qualities of the product are due to the geographical environment, including natural and human factors.

'Geographical Indication' includes both of the above concepts.

For the purposes of the discussions of reform proposals in April 2001 by the TRIPS Council, the WTO Secretariat adopted the term 'indications of geographical origin' to designate the different expressions used by WTO members to protect geographical origin of products (WTO 2001).

Trademarks

In general terms, trademarks are signs, which are used in order to distinguish the goods or services of one undertaking from the goods or services of another undertaking. In the TRIPS Agreement, Article 15.1 states: 'Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of another undertakings, shall be capable of constituting a trademark.' It follows from that definition that the main function of a trademark is to distinguish the goods and/or services for which the trademark is used. Only trademarks that are distinctive can perform that function.

The TRIPS Agreement does not give any indication under what circumstances a sign has to be considered distinctive in respect of certain goods or services. However, it is commonly accepted that, in order to be considered distinctive, signs used as trademarks must not be descriptive or deceptive.

As a general proposition, geographical indications are unlikely to be considered more than descriptive. Indeed, many trademark laws both explicitly disqualify geographic marks from protection as inherently distinctive marks and provide as a defence to trademark infringement, the fact that a mark identifies a geographic area which could be understood to constitute a reference to the origin of the relevant goods. However, it may be possible to use a geographical term as trademark in cases where that trademark, despite being originally descriptive, has acquired distinctive character (or secondary meaning) through use.

Differences between geographical indications and trademarks

As is indicated by the discussion above, a geographical indication is a generic description that is applicable to by all traders in a particular geographic location to goods which emanate from that location. A trademark is a sign which distinguishes the products of a specific trader from those of its competitors. Thus it is not likely to be descriptive and it cannot be generic. The right to protect a geographical indication from wrongful appropriation is enjoyed by all traders from the particular geographical location, whereas a trademark is protected from wrongful appropriation at the suit of the registered proprietor of that mark. Generally, geographic indications are monitored and protected by producer associations from the relevant region. Unlike trademarks, geographical indications are not freely transferrable from one owner to another, as a user must have the appropriate association with the geographical region and must comply with the production practices of that region.

International protection of geographical indications

Paris Convention for the Protection of Industrial Property, 1883

The first multilateral agreement, which included 'indications of source or appellations of origin' as objects for protection by national industrial property laws, was the Paris Convention. Under Article 10(1), provision is made for seizure upon importation of

goods bearing false indications of the source of goods or the identity of the producer. Under Article 10(2), any

producer, manufacturer, or merchant whether a natural person or legal entity, engaged in the production or manufacture of or trade in such goods and established either in the locality falsely indicated as the source, or in the region where such locality is situated, or in the country falsely indicated, or in the country where the false indication of source is used, shall in any case be deemed an interested party.

Article 10*bis* also afforded protection against false or misleading indications of source as a means of repressing unfair competition. Included under the definition of unfair competition are any acts that create confusion, or allegations, the use of which in the course of trade are liable to mislead the public, as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of goods.

Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods, 1891

The original form of the Paris Convention prohibited the use of false geographical indications. A number of signatory nations proposed a more comprehensive form of regulation for what was considered to be a significant intellectual property abuse. The 1891 Madrid Agreement concerning the protection of geographical indications was their response. Article 1 provided that all goods 'bearing a false or misleading indication' to a signatory country, or to a place in that country 'shall be seized on importation'. However, this agreement failed to attract the accession of significant trading nations such as the USA, Germany and Italy. A threshold problem with this agreement and with subsequent revisions was the inability of nations to exempt geographical indications which had become generic within their borders.

International Convention on the Use of Appellations of Origin and Denominations of Cheeses ('Stresa Convention'), 1951

The parties to the Stresa Convention, which are some of the cheese-producing countries of Europe,² 'pledge themselves to prohibit and repress within their respective territorial confines the use, in the language of the state or in a foreign language, of the "appellations d'origine", denominations and designations of cheeses contrary to the principles stated in Articles 2–9 inclusive'. The Convention, which entered into force on 1 September 1953, applies to all specifications which constitute false information as to the origin, variety, nature or specific qualities of cheeses, which are stated on products that might be confused with cheese. The term 'cheese', according to Article 2.1 of the Convention, is reserved for 'fresh and matured products obtained by draining after the coagulation of milk, cream, skimmed or partially skimmed milk

or a combination of these', or by 'products obtained by the partial concentration of whey, or of buttermilk, but excluding the addition of any fatty matter to milk'.

Article 3 provides that the appellations of origin of those cheeses 'manufactured or matured in traditional regions, by virtue of local, loyal and uninterrupted usages' which are listed in Annex A are exclusively reserved to those cheeses, 'whether they are used alone or accompanied by a qualifying or even corrective term such as "type", "kind", "imitation" or other term'. Annex A lists: Gorgonzola, Parmigiana Romano, Pecorino Romano and Roquefort. Annex B lists a number of designations for cheese, which are prohibited by Article 4.2 for products that do not meet the requirements provided by contracting parties in relation to 'shape, weight, size, type and colour of the rind and curd, as well as the fat content of the cheese'. Listed in Annex B are Asiago, Camembert, Cambozola, Danablu, Edam, Emmental, Esrom, Fiore Sardo, Fontina, Gruyère, Pinnzgauer Berkäse, Samsøe, and Svecia.

The Stresa Convention came into force prior to the EEC Treaty and its regime providing for the free movement of goods. In the *Deserbais* case³, the ECJ held that the EEC Treaty did not affect the duty of a Member State to respect the rights of non-member countries under the prior agreement. Similarly, in the *Cambozola* case⁴ the ECJ ruled that the free movement of goods principle was subordinated to the Stresa Convention and Council Regulation (EEC) No 2081/92 permitting the registration and enforcement of rights in relation to designations of origin.

Lisbon Agreement for the Protection of Appellations of Origin and their Registration, 1958

The Lisbon Agreement established an international system of registration and protection of appellations of origin. It adopted the French definition of appellation of origin by restricting the protected indications to cases in which the quality and characteristics of a product are 'due exclusively or essentially to the geographical environment, including natural and human factors'.

The Agreement provided for the registration, at the International Bureau of WIPO, of appellations of origin which are 'recognized and protected as such, in their country of origin'. Countries are thus free to adopt their own system of designating appellations, either by judicial or administrative decision, or both. Once registered, a geographic indication is protected in other member nations. The countries have to ensure that any kind of usurpation or imitation is prohibited under their laws. Finally, the Agreement provides that no genetic indication can be deemed generic in any other country, as long as it is protected in its country of origin.

The Lisbon Agreement failed to attract support from more than a few nations. One problem was that accession was confined to those nations which protected appellations of origin 'as such'. Thus, states that protected this form of intellectual property under unfair competition or consumer protection laws were locked out. Also the Agreement did not make exception for geographic indications which had already become generic in member states. However, it has been suggested that the Register of appellations of origin established under the Lisbon Agreement and

administered by WIPO provides a convenient solution to the establishment of the multilateral register foreseen in TRIPS (Gervais 2010).

WIPO Proposals

In 1975, WIPO issued a Draft Treaty on the Protection of Geographical Indications. The Draft Treaty provided for the protection both of appellations of origin and geographical indications. Unlike the Lisbon Agreement, it did not require signatories to have domestic laws for the protection of appellations of origin. In 1990, WIPO issued a memorandum asserting the continuing need for a treaty on this subject (WIPO 1990).

In 1975, WIPO also issued a Model Law on geographical indications for adoption by developing countries. The Model Law defined ‘appellation of origin’ as:

The geographical name of a country, region, or specific place which serves to designate a product originating therein, the characteristic qualities of which are due exclusively or essentially to the geographical environment, including natural factors, human factors, or both ... any name which is not that of a country, region or specific place is also considered a geographical name if it relates to a specific geographical area, when used in connection with certain products.

The Model Law also defined ‘indication of source’ as ‘any expression or sign used to indicate that a product or service originates in a country or region or a specific place’. This would embrace symbols such as an Egyptian pyramid or the Eiffel Tower, as well as the birds and animals associated with a place.

The Model Law establishes a system for the registration of appellations of origin and includes an optional provision permitting national courts to determine whether particular terms are generic. Upon registration, appellations are only protected if used by producers of products carrying on business in the area described by the appellation and only if their products possess the essential characteristics associated with the appellation.

Finally, the Model Law provided that:

It shall be unlawful to use, in the course of trade, a registered appellation of origin of origin, or a similar name, with respect to the products specified in the Register or similar products, even if the true origin of the products is indicated, or if the appellation is in the form of a translation or is accompanied by terms such as ‘kind’, ‘type’, ‘make’, imitation’, or the like.

In 1990, WIPO issued a memorandum asserting the continuing need for a treaty on this subject. This has not been taken up by the WIPO Committee of Experts on the International Protection of Geographical Indications.

TRIPS Agreement

Section 3 of the TRIPS Agreement, which is concerned with GIs (see Blakeney 2001) covers six topics: (i) Definition and scope of a geographical indication; (ii) Minimum standards and common protection provided for geographical indications corresponding to all kinds of products; (iii) the interrelationship between trademarks and indications of origin; (iv) Additional protection for geographical indications for wines and spirits; (v) Negotiation and review of section III on geographical indications; and (vi) Exceptions to the protection of geographical indications.

Article 22 defines geographical indications as:

[I]ndications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

This definition expands the Lisbon Agreement concept of appellation of origin to protect goods that merely derive a reputation from their place of origin without possessing a given quality or other characteristics which is due to that place. Also, under the TRIPS Agreement, a geographical indication to be protected has to be an indication, but not necessarily the name of a geographical place on Earth. Thus, for example, 'Basmati' is taken to be an indication for rice coming from the Indian sub-continent, although it is not a place name as such. The indication has to identify goods as originating in the territory of a member, a region or a locality of that territory. This definition also indicates that goods to be protected should originate in the territory, region or locality to which it is associated. This suggests that licences for the use of geographical indications cannot be protected under the TRIPS Agreement.

The TRIPS definition permits members protect geographical indications of goods where the quality, reputation or other characteristic of goods are attributable to their geographical origin. The TRIPS Agreement does not specify the legal means to protect geographical indications. This is left for members to decide.

The interrelationship between the protection of trademarks and of appellations of origin is accommodated by Article 22.3 of the TRIPS Agreement, which permits a member, *ex officio* if its legislation so permits or at the request of an interested party, 'refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating the territory indicated, if the use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin'.

Cognizant of the fact that for most countries the protection of geographical indications will be an innovation, Article 24.4 exempts from this form of protection trademarks which have been 'applied for or registered in good faith' or where the rights to the trademark 'have been acquired through use in good faith' either before the implementation of the TRIPS provisions, or before the geographical indication is protected in its country of origin.

Article 24.7 provides that a member may provide that any request made under the section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that member, or after the date of registration of that trademark, provided the registration has been published and 'provided that the geographical indication is not used or registered in bad faith'.

Similar to the analogous provision in most trademark laws, Article 24.7 preserves 'the right of a person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public'.

Finally, Article 24.9 provides that there is no obligation under the TRIPS Agreement to protect geographical indications 'which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country'.

In addition to the general protection for geographical indications for wines and spirits within the general context for the protection of geographical indications contained in Article 22, additional protection is accorded geographical indications for wines and spirits by Article 23. This additional protection has two components: (i) protection for each geographical indication for wines in the case of homonymous indications; and (ii) the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those members participating in the system.

These provisions give geographical indications for wines and spirits stronger protection than that provided in Article 22 for all products. For some countries, this additional protection is regarded as an unacceptable discrimination against all other products and they have agitated for an extension of that protection to all kinds of geographical indications.

Article 24.1 obliges members 'to enter into negotiations aimed at increasing the protection of individual geographic indications under Article 23'. Although Article 24 contains a number of paragraphs excepting certain matters from protection as geographical indications, Article 24.1 disallows members from using these exceptions as an excuse for the refusal to conduct negotiations. Also in implementing this negotiation obligation, Article 24.3 requires that a member 'not diminish the protection of geographical indications' which existed in that member prior to the date of the entry into force of the WTO Agreement. Nevertheless, a group of countries considers that the above interpretation constitutes to be a very legalistic approach. They believe that this provision permits negotiations to extend the additional protection for geographical indications for wines and spirits to all kinds of products.

In order to facilitate the protection of geographical indications for wines, Article 23.4 provides that 'negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system'. The effect of this provision will be to absorb the registration scheme established under the Lisbon Agreement and to remove the justification for

the negotiations within WIPO for a new treaty on the protection of geographical indications which has been under preparation since 1974.

The extension debate

A submission by Turkey of 9 July 1999, prior to the Seattle Ministerial, proposed the extension of the multilateral register to products other than wines and spirits.⁵ This proposal was endorsed by the African group of countries. In a document of 6 August 1999, Kenya, on behalf of the African Group, noted at the Singapore Ministerial that the Article 23.4 negotiations concerning a multilateral register for wines had been extended to include spirits.⁶ Consequently, it submitted (at para 27):

Considering that Ministers made no distinction between the two above-mentioned products, the African Group is of the view that the negotiations envisaged under Article 23.4 should be extended to other categories, and requests, in this regard, that the scope of the system of notification and registration be expanded to other products recognizable by their geographical origins (handicrafts, agro-food products).

At the TRIPS Council meetings in 2000, misgivings were expressed by some delegations regarding the extension of Article 23.1 protection and the multilateral register beyond wines and spirits. In the meeting of the TRIPS Council held on 26–29 June 2000, the representative of Kenya said: ‘It was difficult to explain to people in the developing world that their representatives were involved in negotiations in the WTO concerning additional protection for wines and spirits without any benefit being offered to developing countries.’⁷

The Chair of the TRIPS Council sought to separate the discussion of Article 23.2 from 24.2 to avoid confusion. A response to this suggestion was a proposal in October 2001 from Bulgaria, the Czech Republic, Egypt, Iceland, India, Kenya, Liechtenstein, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey that the extension of geographical indications to products other than wines and spirits be included as an extension of the built-in agenda.⁸

The above developments are important for an understanding of the way in which the question of GIs was included within the Doha Ministerial Declaration adopted on 14 November 2001.⁹ Clause 18 of the Declaration provided:

With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this declaration.

The Hong Kong Ministerial Declaration of November 2005 affirmed the 'central importance of the development dimension in every aspect of the Doha Work Programme'. Ambitious claims associating the protection of GIs with economic development are now made by those developing countries that support the international protection of GIs. It is put forward as a means of sustaining rural communities by helping to guarantee food security for those without cash incomes, helping to natural environmental disasters and biodiversity (see UNDP 2004).

Underpinning the debate about the extension of the additional protection enjoyed by wines and spirits to other products is how the distinction between Articles 22 and 23 came about. In a communication dated 15 September 2000, from Bulgaria, the Czech Republic, Iceland, India, Liechtenstein, Slovenia, Sri Lanka, Switzerland and Turkey, it is suggested that:

6. This differential treatment of geographical indications can only be explained in the light of the negotiations of the Uruguay Round. The relevant TRIPS provisions are the result of trade-offs which were specific to the circumstances prevailing at the time of the Uruguay Round negotiations, in particular during the Brussels Ministerial Conference (1990). This was, to some extent, due to the link at that time between the negotiations on geographical indications and the negotiations on agriculture.

7. There is no systematic or logical explanation for the distinction made in Section 3 of Part II of the TRIPS Agreement. This distinction ignores that geographical indications for categories of goods other than wines and spirits are equally important for trade. The economic and political significance of geographical indications is growing as increasing quality awareness and higher quality requirements promote the demand for products of a specific geographical origin. The added value to exported goods increases the chances for such legitimate goods to reach the market which is part of the global vision for a multilateral trading system. That is why, since the end of the Uruguay Round, the awareness of the need for an extension of additional protection to products other than wines and spirits has continuously increased and spread among Members.

8. Since not all issues relevant to the protection of geographical indications were settled in the Uruguay Round, the built-in agenda of the TRIPS Agreement provides for the basis for further negotiations on increasing the protection of geographical indications.¹⁰

In other words, the distinction between Articles 22 and 23 is said to be almost accidental as the same policy reasons which require the extended protection for wines and spirits apply to other products.

A comprehensive discussion of the practical implications of the differences between the two Articles is contained in the submission by the Swiss delegation to the TRIPS Council meeting of 21 and 22 September 2000. The representative of Switzerland explained that '[s]ome Members might ask why it was so important to have this

additional protection also for other products than wines and spirits and whether the current protection for these products was not sufficient'. After describing the terms of both Articles, he provided an example illustrating why the additional protection under Article 23 'was also needed for geographical indication other than those for wines and spirits', explaining:

Rice that was sold under the Indian geographical indication 'Basmati', but which was clearly marked as originating from another region or country, would not mislead the public as to the place of origin of that product; nevertheless, such use would free-ride on the worldwide famous and therefore commercially valuable geographical indication 'Basmati'. The same applied with regard to the famous Swiss cheese 'Vacherin Mont d'Or', for example. There was no systematic or logical explanation for the distinction made in Section 3 of Part II of the TRIPS Agreement and this distinction ignored that geographical indications for categories of goods other than wines and spirits were equally important for trade.

The different roles of Articles 22 and 23 were also addressed in a communication dated 23 March 2001, from Bulgaria, Cuba, the Czech Republic, Egypt, Iceland, India, Liechtenstein, Mauritius, Nigeria, Sri Lanka, Switzerland, Turkey and Venezuela.¹¹ At the meeting of the Council for TRIPS of 2–5 April 2001, Jamaica, Kenya, Pakistan and Slovenia requested that their delegations also be reflected as co-sponsors. The representative of Kenya associated his delegation with the proposal introduced by Switzerland regarding the extension of the higher level of protection to geographical indications for products other than wines and spirits citing its association with a number of agreements in this field, such as the OAU Model Law which provided protection for a wide range of products, including food products and handicrafts.¹² He argued that 'different levels of protection amounted to an unfair trade practice, or discrimination, i.e. something that the WTO should not be seen to support'.¹³

Introducing the communication, the representative of Switzerland said that he expected there to be more co-sponsors of the proposal contained in it and requested the Secretariat to explain that the protection provided by Article 22 in respect of GIs for products other than wines and spirits was insufficient in practice, because the 'misleading test' was a burdensome requirement tailored to suit laws for the protection against unfair competition or the protection of consumers, but not the protection of intellectual property.¹⁴ Unlike Article 23, Article 22 did not prevent the use of geographical indications in translation or accompanied by expressions such as 'style', 'type', 'kind', 'imitation' or the like and thus enabled free-riding on renowned GIs by products not possessing the qualities that the original products displayed due to their origin.

Also Switzerland argued that the 'misleading test' of Article 22 resulted in legal uncertainty as to the enforcement and protection of individual GIs at the international level, because it was up to the national courts and administrative authorities to decide whether or not the public was misled by the use of a particular GI and the question of whether or not the public was being misled and how the legal and

administrative authorities applied and interpreted the 'misleading test' differed from one country to another.¹⁵ The result was inconsistency of decisions and legal uncertainty as regards the protection of GIs and their enforcement at the international level. The possible distortions that this could create at the multilateral level could be remedied by granting protection as under Article 23 not only to GIs for wines and spirits, but also to those for other products.¹⁶

At the TRIPS Council meetings of 27–30 November and 6 December 2000, the representative of Mauritius said that extending the scope of Article 23 to products other than wines and spirits was a coherent step based on what was already in the Agreement.¹⁷ She pointed out that Article 22.1 made clear that the provisions of the TRIPS Agreement covered geographical indications for all goods, however, it was the insufficient level of protection provided by Article 22 that had led to the establishment of a higher level of protection for wines and spirits. Thus, given that Article 22 already provided for the protection of geographical indications in respect of all goods, her delegation believed that the intention, as directed by this principle, had been that goods other than wines and spirits should be covered and 'this was how it read the mandate in Article 24.1'.¹⁸ She also stated that her delegation did not believe 'that there was any justification for a selective protection of products, the more so as the trade value of a geographical indication was equally relevant for products other than wines and spirits'.¹⁹ Consequently, they felt that the higher level of protection currently granted to wines and spirits should be extended to other products generally and that one level of protection for all products would certainly provide greater predictability for trade in these products. She also pointed out that a country such as hers was asked to liberalize in the areas of agriculture and services, and its response was that it did not think that it could actually do so in such a simple manner, because it did not have the competitive capacity to survive in a liberalized world. Realizing that it had one or two geographical indications, which could provide it with a niche market for one or two small products, it was participating in the present debate in the hope that, maybe after all, it could get some opportunities out of it.

Costs of extension

In opposition to the proposals for an extension of the protection of geographical indications for wines and spirits under TRIPS to all products, on 29 June 2001, a joint communication was sent to the TRIPS Council by Argentina, Australia, Canada, Chile, Guatemala, New Zealand, Paraguay and the United States (Joint Communication).²⁰ The Communication argued that the advantages of Article 23 protection was overstated and, relevantly for the current project, that the proposals for the extension of the TRIPS wines and spirits provisions to all products had insufficiently addressed the costs and burdens of this extension. It stated that '[t]hese new costs and burdens include administration costs, trade implications for producers, increased potential for consumer confusion, potential producer conflicts within the WTO Members and a heightened risk of WTO disputes'.²¹ The catalogue of costs outlined in this Joint Communication is annotated below.

Administration costs

The Joint Communication pointed out that the extension of Article 23.1 would create additional obligations under the TRIPS Agreement, which would require the implementation of new laws and administrative mechanisms and would need to be implemented at the national level by all WTO members, both developed and developing, that did not already provide 'additional protection' for products other than wine and spirits. It stated that implementing and administering new laws 'would involve considerable costs in terms of both money and other resources for most governments, and may impact proportionately more on developing countries'.²² It should be pointed out that the Joint Communication did not specify what these additional costs might be.

Commenting on the Joint Communication at the meetings of the TRIPS Council on 18–22 June 2001, the representative of Mauritius observed that the implementation of the Uruguay Round agreements as a whole was costly, but that there was no reason why an extension of additional protection should be much more expensive than the existing additional protection for wines and spirits.²³ She also suggested that the new obligations would extend to all members, including those that chose not to protect any of their own domestic GIs and that this could involve a considerable burden, particularly in view of the fact that some members, such as the EU countries, have many hundreds of domestic geographical indications and would presumably expect 'additional protection' of these terms by all other members.²⁴ This is no different to the burdens imposed by other categories of registrable industrial property such as patents and trademarks, where in all developing countries and LDCs and most developed countries, foreign applicants outnumber domestic applications. The ideal solution to these problems is for registration fees to cover these costs.

At the TRIPS Council meeting of 19–20 September 2001, the representative of Kenya pointed out that the additional cost of extension should not be a major issue as developing countries were facing considerable costs in implementing the TRIPS Agreement.²⁵ Small additional costs resulting from extension would be offset by the benefits that accrue from it. He said that 'especially for Members from the developing world, geographical indications in the areas of agriculture, handicraft and foodstuffs were a mainstay in their economy and trade'.²⁶

Trade implications for producers

The Joint Communication suggested that the recognition of GIs might also require that producers incur costs 'if they are forced to give up the use of commercially significant terms, as they would be forced to re-name, re-label and find new ways of marketing products that use such terms, both in domestic and overseas markets' (para 21) particularly, where they 'have traditionally used a term and are suddenly forced to give it up' (para 23). This suggestion tends to ignore the effects of Article 24.6 of TRIPS which provides that:

Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods

or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member.

Finally, the Joint Communication suggests that industries such as the emerging dairy industry in some countries ‘may find potentially lucrative export markets closed to their products, as the government of the importing market or a third party may claim exclusive rights over the terms used to market those products’ (paras 23 and 24). This obstacle is not attributable to Articles 23 or 24 of TRIPS, but the already existing GIs protection that exists in importing countries under their domestic laws and the general prohibition of Article 22 of TRIPS for countries to eliminate misleading GIs.

Consumer costs

Similarly, the Joint Communication identifies ‘the cost of the consumer confusion caused by the disappearance of terms customarily used to identify products’ which ‘will increase search and transaction costs for consumers, at least in the short to medium term, and potentially prices as well’ (para 25). Again, this ignores the exception in Article 24.6 for terms that are customary in common language in the member’s country and the general obligation to eliminate misleading GIs.

Increased risk of producer conflict over individual GIs

The Joint Communication also stated that the process of defining GIs ‘would likely lead to disputes between producers’ particularly within a country ‘over demarcation of the region to be covered by a particular GI’ and between ‘countries (particularly those with shared borders and therefore a shared history) which produce the same good and have traditionally used a certain GI’ (paras 26 and 27). In addition to ignoring the effect of Article 24.6 of TRIPS, this observation overlooks the effect of Article 24.4, which provides:

Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

In the event that Article 24 is extended to products in addition to wines and spirits, WTO members would be permitted to continue to use those GIs which had already been in use for those products.

A joint communication from a group of countries, including Kenya and Nigeria,²⁷ suggested that the concerns of the USA and the other proponents of the Joint

Communication of 29 June 2001 were unfounded. The representative of Switzerland, introducing the new paper at the TRIPS Council meetings of 19–20 September 2001, pointed out that the additional protection of Article 23.1 would not create the obligation for members to create a new, costly and burdensome regime as members already had to provide protection for GIs under Articles 22 and 23.²⁸ Secondly, it rejected the argument that that extension would lead to renaming of products and thereby confuse consumers, since GIs indicated the true origin of a product and prevented consumers from being misled. As for the argument that GIs would restrict trade, the Swiss delegate pointed out: ‘Every Member had a national heritage and traditional products which either by their origin or inherited know-how were of a unique blend and character, whether Members were already making use of this added value or were only beginning to do so on the world market. Extension held much to gain for all Members, developed, developing and least-developed.’²⁹

The representative of India identified as a fundamental problem for his country ‘was that products of world-class reputation, such as Basmati rice and Darjeeling tea, faced competition from products sold under the same name in combination with the word “style” and thus free rode on the indication of origin’.³⁰ He asked opponents of extension to explain how India could avoid losing trade through these practices, which members were permitted to allow under the TRIPS Agreement for products other than wines and spirits. He pointed out that the basic problem was the imbalance in the Agreement and there had been no convincing argument as to why wines and spirits alone should benefit from additional protection.

Increased risk of disputes between WTO members

Finally, the Joint Communication warns that any member which did not provide the extended Article 23.1 protection for other members’ GIs could be involved in difficult and burdensome dispute settlement at the WTO.³¹ This argument is equally applicable to the current formulation of Article 23.1 in its application to wines, but to date there have been no such disputes.

The Multilateral Register

In June 2005, the EC submitted a proposal to amend the TRIPS Agreement to provide global protection for GIs in a multilateral system of registration.³² This proposal seeks to bring international protection for GIs into conformity with the European Union where a Community-wide system for their registration is considered an indispensable part of agricultural policy, serving both to preserve the incomes of small to medium-size producers and to guarantee the sustainability of the rural economy. The EC submission set out provisions for a centralized register that would be compulsory and have legal effect. The EC proposal aimed at preserving each WTO member’s prerogative to determine whether a certain sign, indication or geographical name does indeed meet the TRIPS definition of a geographical indication. Given the fact that it possesses more than 700 registered geographical indications,³³ sophisticated

institutional infrastructure and technical prowess, the EU is exceptionally well placed to leverage the benefits of an expanded international system of GI protection. The EC submission set out provisions for a centralized register that would be compulsory and have binding legal effect. The EC proposal aimed at preserving each WTO member's prerogative to determine whether a certain sign, indication or geographical name met the TRIPS definition of a geographical indication.

Opponents of the EC proposal the USA, Australia, Argentina, Australia, Canada, Chile, Ecuador, El Salvador and New Zealand argued against the extension of GIs protection, taking the position that the international protection of GIs is adequate as it stood and that such a drastic development would only serve to undermine future gains in market access for non-European food and agricultural products.³⁴ Concern was also expressed about the additional costs and administrative burdens of implementing a distinct system of GI protection in addition to the TRIPS obligations. They advocated a system of voluntary notification and registration with no obligation to protect registered GIs.

A revised Communication from these countries, together with South Africa, proposed that the TRIPS Council should set up a voluntary system where notified geographical indications would be registered in a database.³⁵ Those governments choosing to participate in the system would have to consult the database when taking decisions on protection in their own countries. Non-participating members would be 'encouraged' but 'not obliged' to consult the database.

Hong Kong, China proposed a compromise under which a registered term would enjoy a more limited 'presumption' than under the EU proposal, and only in those countries choosing to participate in the system.³⁶

In July 2008, a group of WTO members called for a 'procedural decision' to negotiate three intellectual property issues in parallel: these two geographical indications issues and a proposal to require patent applicants to disclose the origin of genetic resources or traditional knowledge used in their inventions.³⁷ In relation to the GIs Register the proposed text was:

- 1 Members agree to establish a register open to geographical indications for wines and spirits protected by any of the WTO Members as per TRIPS. Following receipt of a notification of a geographical indication, the WTO Secretariat shall register the notified geographical indication on the register. The elements of the notification will be agreed.
- 2 Each WTO Member shall provide that domestic authorities will consult the Register and take its information into account when making decisions regarding registration and protection of trademarks and geographical indications in accordance with its domestic procedures. In the framework of these procedures, and in the absence of proof to the contrary in the course of these, the Register shall be considered as a *prima facie* evidence that, in that Member, the registered geographical indication meets the definition of 'geographical indication' laid down in TRIPS Article 22.1. In the framework of these procedures, domestic authorities shall consider assertions on the genericness exception laid down in TRIPS Article 24.6 only if these are substantiated.

- 3 Text based negotiations shall be intensified, in Special Sessions of the TRIPS Council and as an integral part of the Single Undertaking, to amend the TRIPS Agreement in order to establish the Register accordingly.

In relation to GI extension, the proposed text was:

- 7 Members agree to the extension of the protection of Article 23 of the TRIPS Agreement to geographical indications for all products, including the extension of the Register.
- 8 Text based negotiations shall be undertaken, in Special Sessions of the TRIPS Council and as an integral part of the Single Undertaking, to amend the TRIPS Agreement in order to extend the protection of Article 23 of the TRIPS Agreement to geographical indications for all products as well as to apply to these the exceptions provided in Article 24 of the TRIPS Agreement *mutatis mutandis*.

To date, WTO members remain divided over the proposal to negotiate the three subjects in parallel, with opponents arguing that the only mandate for the TRIPS Council is to negotiate the multilateral register. Under the Chairmanship of Ambassador Trevor C. Clarke (Barbados) during 2008–2009, the Special Session of the TRIPS Council considered the various proposals which had been made and the Chairman identified as ‘crucial’ the two issues of participation and consequences/legal effects of registration.³⁸

With respect to the issue of whether participation in the system should be voluntary or mandatory, some WTO members interpreted the reference in the mandate concerning ‘a multilateral system’ to mean that the system should apply to all members. Other members argued that the words ‘those Members participating in the system’ mean that not all members are expected to participate. Ambassador Clarke encouraged members ‘to continue searching for an acceptable solution that would determine a participation of Members in the Register that renders it a useful and meaningful tool in line with its purpose to facilitate protection.’³⁹ With respect to the consequences/legal effects of registration, all members seem to accept an obligation to consult the information on the Register and to take the information on the Register into account when making decisions regarding registration and protection of trademarks and geographical indications under their national procedures. However, views differ significantly as to how such information should be taken into account, what weight and significance should be given to it, and whether there should be a specific legal obligation to take the information into account.

In order to advance the negotiations, Ambassador Clarke suggested the following ‘Guiding Principles’:

The purpose of the Register is to facilitate, not to increase, the protection of GIs for wines and spirits.

The Register should be useful and meaningful to both notifying Members and consulting Members.

The territorial nature of intellectual property rights should be preserved.

The Register should not impose undue financial and administrative burdens on Members. Special and differential treatment should be precise, effective and operational.⁴⁰

Ambassador Clarke's successor as Chairman of the Special Session of the Council for TRIPS, Ambassador Darlington Mwape (Zambia), announced, upon assuming this office that the specific negotiating mandate of the Special Session was limited to the negotiations of a Multilateral Register of GIs for wines and spirits.⁴¹ He has strenuously resisted any calls for the extension of the Multilateral Register to products other than wines and spirits. In his report to the Trade Negotiations Committee (TNC) of 22 March 2011, he reiterated that 'the specific negotiating mandate of the Special Session is limited to the negotiations of a Register of GIs for wines and spirits, and other TRIPS-related issues are being handled in another context and at a different level'.⁴² Ambassador Mwape is adhering to the strict letter of the Doha mandate. For the reasons mentioned above, there is no justification in principle for the differential treatment of wines and spirits in comparison with other products, both in relation to Article 23, as well as in relation to the multilateral register. If the extension of the register is to be addressed, it will have to be in the context of the general extension debate, as part of the periodic revisions of the TRIPS Agreement.

Indeed, Ambassador Mwape has had a singular lack of success in securing agreement from negotiating parties even on a draft composite text on the Register. Ambassador Mwape reported that this text was 'without prejudice to Members' positions on the overall outcome of the negotiations' and that 'Members are working on the understanding that nothing is agreed until everything is agreed, and that Members may revert to any issue of the text at any time'.⁴³ Ambassador Mwape reported that, despite the fact that this text reflects the current state of negotiations, views differ on 'whether and how the negotiating mandate should be accurately reflected in the Draft Composite Text' and that both sides appear to prefer that the text represents 'the factual representation of the state-of-play in this negotiating group' at this time.⁴⁴ Ambassador Mwape explained: 'I have made strenuous attempts to resolve this and have offered to use my prerogative as Chair to improve textual compliance with the Special Session of the Council for TRIPS mandate. However, Members have been unable to engage constructively on this question and have instead insisted that the purely bottom-up and Member-driven nature of the text be scrupulously respected at this time'.⁴⁵ In view of this situation, it may well be the case that the ACP Group of countries are better advised to address the possible extension of the multilateral register in the context of the general extension debate.

GI disputes under the TRIPS Agreement

A number of WTO members argued that the EU scheme for the protection of GIs was TRIPS-deficient in a number of areas. For example, the statement of the US to the WTO on the WTO trade policy review of the European Union expressed the concern that 'foreign persons wishing to obtain protection for their GIs in the EU itself face a non-transparent process that appears to come into some conflict with the EU's TRIPS obligations' and that 'EU rulemaking processes are often perceived by third countries

as exclusionary, allowing no meaningful opportunity for non-EU parties to influence the outcome of regulatory decisions'.⁴⁶ On 1 June 1999, the US requested consultations with the European Communities (EC) pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Article 64 of the TRIPS Agreement regarding EC Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The United States and the EC held consultations on 9 July 1999, and thereafter, but these and following consultations failed to resolve the dispute.

In view of the global markets at stake in the agricultural and food processing sectors, the US and Australia became so concerned at the systematic discrimination their trademark owners faced in enforcing their rights against European registered GIs that they invoked the WTO dispute settlement procedure. On 18 August 2003, the US and Australia requested the establishment of a WTO dispute settlement panel to review the consistency of the EU Regulation 2081/92 with the rules of the TRIPS and GATT Agreements.⁴⁷ The US and Australia argued that the EU scheme for the protection of geographical indications failed to comply with TRIPS in three chief respects.

First, they claimed the EC Regulation was discriminatory and in violation of the national treatment obligations and the most-favoured-nation obligations in Articles 3 and 4 of the TRIPS Agreement and Articles I and III of the General Agreement on Tariffs and Trade 1994. The TRIPS Agreement requires that members accord most-favoured-nation treatment to the GIs of fellow member states and national treatment to the geographical indications of their citizens. The US and Australia argued that Regulation 2081/92 does not provide the same treatment to other nationals and products originating outside the EC that it provides to the EC's own nationals and products, does not accord immediately and unconditionally to the nationals and products of each WTO Member any advantage, favour, privilege or immunity granted to the nationals and products of other WTO members, diminishes the legal protection for trademarks, does not provide legal means for interested parties to prevent the misleading use of a geographical indication, does not define a geographical indication in a manner that is consistent with the definition provided in the TRIPS Agreement, is not sufficiently transparent, and does not provide adequate enforcement procedures.

As a result of the alleged violation, when US holders of geographic indications such as Florida Oranges and Idaho Potatoes sought registration under the EC Regulation, they were subject to a requirement of reciprocity and equivalence. Although expressed to be 'without prejudice to international agreements', Article 12 states that the Regulation 'may apply to an agricultural product or foodstuff from a third country' provided that:

- the third country is able to give guarantees identical or equivalent to those referred to in Article 4,
- the third country concerned has inspection arrangements and a right to objection equivalent to those laid down in this Regulation,
- the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products for foodstuffs coming from the Community.

They also claimed that the grant of exclusive rights in the use of the mark provided by virtue of TRIPS Article 16.1 require member states to make available to earlier trademark owners' rights against GIs. The United States argued that the Regulation was inconsistent with the exclusivity of the trademark owners' rights under Article 16.1 of the TRIPS Agreement because it does not ensure that a trademark owner may prevent uses of GIs that would result in a likelihood of confusion with a valid prior trademark.

Thirdly, they argued that Regulation 2081/92 was inconsistent with the EC's obligations under Article 24.5 of the TRIPS Agreement, since the Regulation failed to provide sufficient protection to pre-existing trademarks that were similar or identical to a geographical indication.

Food exporters in the United States were concerned that geographical indications should not be given precedence over trademark rights. The issue was one of priority between a coexisting GI and a trademark and whether the principle of first-in-time, first-in-right should be enforced as it is in the trademark law of the United States. In contrast, in the EU, trademarks are required to coexist with geographical indications. Under European law, a trademark owner's rights cannot prevail over a third party using a duly registered GI in accordance with honest business practices.⁴⁸ As a result, private trademark suits brought by US litigants against European-owned GIs might well result in the US trademark owner having to forfeit valuable rights to priority and exclusivity. Thus, trademark wars over the competitive European market for beer had seen US trademarks 'Budweiser' and 'Bud' subject to termination in various member states of the European Communities because the European law holds 'Budweiser' and 'Bud' to be geographical indications for beer from the Czech Republic.⁴⁹ The cancellation of the 'Budweiser' and 'Bud' trademarks for beer in Europe caused unease among US trademark owners. The obstacles to registering US certification marks as GIs in Europe gave rise to further uncertainty about the security of protection and conditions of competition.

The US and Australia claimed that the EU Regulations imposed two requirements which contravened the national treatment principle contained in Article 2(2) of the Paris Convention as incorporated by Article 2.1 of the TRIPS Agreement: (i) the requirement that enterprises seeking to register GIs possessed a commercial establishment in the EU; and (ii) the requirement that GIs located in the territory of a WTO member outside the EU could only be registered if that member had adopted a system for GI protection that was equivalent to that in the European Communities and provided reciprocal protection to products from the European Communities.

The Panel Report in the dispute was adopted at a meeting of the Dispute Settlement Body on 20 April 2005.⁵⁰ Concerning the discriminatory conditions regarding the registration of foreign GIs and requirement for reciprocity of protection, the Panel decided in favour of the US and Australia. Pursuant to Article 19.1 of the DSU, the Panel recommended that:

The European Communities bring the Regulation into conformity with the TRIPS Agreement and GATT 1994.

The European Communities could implement the above recommendation with respect to the equivalence and reciprocity conditions, by amending the Regulation so as for those conditions not to apply to the procedures for registration of GIs located in other WTO Members.

In an affirmation of the GI as intellectual property, the Panel endorsed the European principle of their coexistence with all but the most famous of prior trademarks. The Panel found that Article 14(2) of the Regulation was a 'limited exception' permitted by Article 17 of TRIPS because it only allows use by those producers who are established in the geographical area of products that comply with the specification.

On the critical issue of whether the nationals of other WTO members were accorded less favourable treatment than the European Communities' own nationals, the Panel ruled that the conditions in the Regulations modified the effective equality of opportunities to obtain protection with respect to intellectual property in two ways. First, GI protection was not available in respect of geographical areas located in third countries which the Commission had not recognized. It was confirmed that the European Commission had not recognized any third countries. Second, GI protection under the Regulation could become available if the third country in which the GI is located entered into an international agreement with the EU. For the Panel, both of those requirements represented a significant 'extra hurdle' in obtaining GI protection that did not apply to geographical areas located in the European Communities. The significance of the hurdle was taken to be reflected in the fact that currently no third country had entered into such an agreement or satisfied those conditions.⁵¹ Accordingly, the Panel found that the equivalence and reciprocity conditions modified the effective equality of opportunities with respect to the availability of protection to persons wishing to obtain GI protection under the EU legislation, to the detriment of those wishing to obtain protection in respect of geographical areas located in third countries, including WTO members. This was held to be less favourable treatment.⁵²

The Panel noted that, while the Regulation did not prevent a foreign national from producing goods within the territory of the European Communities, the different procedures that applied to foreign nationals compared with those of the EU, were perceived as disadvantageous to the nationals of other members (see Evans and Blakeney 2006).

Special and differential treatment under TRIPS

Contained within the Agreement that established the WTO and a number of the annexed agreements, including TRIPS, are a number of provisions regarding the special and differential treatment (S&dt) of developing countries and LDCs. The objective of S&dt is to minimize the asymmetrical level of WTO member countries' available resources (Alavi 2009). This principle was recognized in paragraph 44 of the Doha Declaration, which stated:

We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

The main general S&dt provisions of TRIPS concern: (i) the phased implementation of its obligations by developing countries and LDCs provided for in Articles 65.2 and 65.4; (ii) technical and financial assistance to facilitate implementation of the Agreement provided for in Article 67; and (iii) the encouragement of technology transfer to LDCs provided for in Article 66.2.

Under Article 65(2), developing countries were required to implement the provisions of TRIPS, including those relating to GIs, by the end of 1999, which was five years from the commencement of the Agreement. LDCs were given an extra five years for implementation by Article 65.4. A decision of 29 November 2005 by the TRIPS Council extended the transition period for the implementation of the TRIPS Agreement by LDCs, from 1 January 2006 to 1 July 2013. That decision called for LDCs to provide the WTO TRIPS Council, preferably before 1 January 2008, with as much information as possible on their individual priority needs for technical and financial assistance for implementing the TRIPS Agreement.

Following comprehensive needs assessment and stakeholder consultation in Sierra Leone undertaken by ICTSD and Saana Consulting in 2007, with funding from the UK Department for International Development (DFID) on 3 October 2007, Sierra Leone made a formal submission of its needs for technical and financial assistance to the TRIPS Council.⁵³ With encouragement from TRIPS Council members and WTO Secretariat, and drawing on the experience of Uganda, Sierra Leone took the initiative in September 2008 to follow up the needs assessment by identifying the priority needs and translating these into a modest, initial two-year technical assistance project to enable the country to start taking forward the implementation of the TRIPS Agreement. A draft project document was prepared by the Government of Sierra Leone for a national technical assistance project on intellectual property rights and the TRIPS Agreement. By a communication from Sierra Leone dated 22 October 2008, the Government of Sierra Leone requested 'immediate consultations with developed country WTO Members, on the operationalizing of Article 67 of the TRIPS Agreement, as well as WIPO, WCO and UNCTAD and the Enhanced Integrated Framework Secretariat, with a view to securing technical and financial assistance for implementation of the proposed IP4SL project.'⁵⁴ To date there has been no provision of technical assistance in response to this request.

Of greatest relevance to the introduction of GIs into LDCs is the encouragement of technology transfer by Article 66.2. It provides that:

Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

The expertise of countries, particularly those in Europe, in establishing and managing GIs systems is an obvious source of expertise for those LDCs seeking to establish the marketing of origin goods. It has been suggested that this S&dt provision should also be extended to developing countries (Michalopoulos 2002: 12).

It has been suggested that S& dt measures are a way of 'rebalancing' the TRIPS Agreement to provide a better reflection of the interests of developing countries and LDCs in line with the objectives of the Agreement which are set out in Article 7 (see Stevens 2003). Although GIs are not an area where there is neat demarcation of developed/developing country interests, it is suggested that 'some developing countries would clearly benefit from higher standards of GIs protection applied to all products'. (Michalopoulos 2002: 14). The development of the multilateral register and its extension to all products is an example of this approach. Also, the 'effective implementation of rules for disclosure of geographic origin for genetic materials would appear to contribute to rebalancing of the TRIPS Agreement in favour of developing countries' (Michalopoulos 2002: 17).

Other possibilities for the international protection of GIs

WTO Agreement on Agriculture

The question of the international protection of GIs has also been pursued, particularly by the EU, outside the TRIPS Council. In February 2003, the EC proposed to the WTO's Committee on Agriculture, that it 'claw back' certain GIs which were being 'used by producers other than the right-holders in the country of origin'.⁵⁵ The EC's approach to geographical indications in the context of the agriculture negotiations is complementary to the TRIPs negotiations. The EC explained that its objective was to negotiate 'specific commitments in order to guarantee fair market access opportunities for those wines, spirits and other agricultural and food-stuff products whose quality, reputation or other characteristics are essentially attributable to their geographical origin and traditional know-how'.⁵⁶ As a follow-up to this proposal, in September 2003, a preliminary list of products (wines, spirits, cheeses and ham) were notified to the Committee which fell into this category.⁵⁷ The claw back proposal was strongly opposed by the same countries that were opposed to GIs extension in the TRIPS Council. The EC sought to allay concerns by referring to the 'grand-fathering' clause of Article 24.4, which would allow the use of protected GIs by producers in third countries providing that they have done so for more than ten years prior to the signing of an amendment.⁵⁸

At the TRIPS Council meetings of 27–30 November and 6 December 2000, the representative of Mauritius pointed out, though, that a country like hers was asked in the areas of agriculture and services to liberalize and its response was that it did not think that it could actually do so in such a simple manner, because it did not have the competitive capacity to survive in a liberalized world.⁵⁹ Realizing that it had one or two geographical indications, which could provide it with a niche market for one or two small products, she indicated that Mauritius was participating in the extension debate in the hope that, maybe after all, it could get some opportunities out of it.⁶⁰

Within the Committee on Agriculture, the view has been strongly pressed that GIs protection was a matter for the TRIPS Council, as the agriculture negotiations focus on food products, whereas proposed negotiations under TRIPS would cover all products including handicrafts, etc.⁶¹ Certainly, the recent WTO documents concerning the negotiations on agriculture make no reference to GIs.

Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge (TK)

At the 9–10 May 2011 workshop on GIs, a number of delegations indicated that CBD issues were more important for them than GIs. The principal CBD issues that have been pursued in the FAO, WIPO and the WTO concern the access to genetic resources, the disclosure of the origin of those resources when forming the basis of patent applications and the sharing of benefits from their utilization, particularly when those resources are identified with the assistance of TK.

By way of example, in 2002, the EU had submitted to the TRIPS Council that the disclosure of origin of genetic resources involved in patent applications should be a mandatory obligation.⁶² This was reiterated by the EU in May 2005 in its submission to the IGC on the ‘Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications’, the EU argued that ‘there are good reasons for an obligation to disclose that an invention is directly based on traditional knowledge associated with the use of genetic resources’.⁶³ The African Group of countries endorsed this EU proposal in its response to the Australia/New Zealand May 2010 submission to the IGC.⁶⁴ The African Group also proposed the principle that IPRs and obligations be clarified ‘with respect to the protection of traditional knowledge, genetic resources and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit sharing’.⁶⁵

On 8 December 2010, the delegation of Angola submitted the proposals of the African Group.⁶⁶ This suggested the commencement of negotiations on a mandatory disclosure requirement and an appropriate way to ensure prior informed consent and fair and equitable benefit sharing, in line with the Nagoya Protocol. The African proposal suggested that negotiations be based upon two current proposals on a mandatory disclosure requirement⁶⁷ and the incorporation of the ‘internationally recognized certificate of compliance’ as stipulated in the Nagoya Protocol, together with any other submission that may be tabled by member countries. In relation to the option for guidelines and recommendations on defensive protection, the African

Group proposed consideration of the use of available databases on GR and/or associated TK.

On 6 May 2010, the delegations of Australia, Canada, New Zealand, Norway and the US submitted a working document⁶⁸ on GR Geneva, for the 17th session of the IGC held 6–10 December 2010. The African Group proposed a number of amendments to this submission. It suggested that ‘inventors/users using genetic resources and/or associated traditional knowledge comply with requirements for prior informed consent and fair and equitable benefit sharing’. That patents not be granted where these requirements are not met and that ‘the patent system must provide for a mandatory disclosure requirement ensuring that the IP Offices becomes a key checkpoint for disclosure and monitoring the utilization of genetic resources and/or associated TK (in line with Article 13 of the CBD Nagoya Protocol)’. In relation to TK, the African Group proposed the following principles:

Recognise and maintain the role of the IP system in promoting innovation and in the protection of traditional knowledge, genetic resources and traditional cultural expressions and fair and equitable sharing of benefits arising from their use.

Promote certainty and clarity of IP rights and obligations with respect to the protection of traditional knowledge, genetic resources and traditional cultural expressions and certainty and clarity for prior informed consent and fair and equitable benefit sharing.

Promoting transparency and dissemination of information by disclosing country of origin and publishing and disclosing technical information related to new inventions, where appropriate and where publicly available, so as to enrich the total body of technical knowledge accessible to the public.

At the Third Intersessional Working Group of the IGC, which met from 28 February 28 to 4 March 2011, a Working Group was appointed to review and rationalize the various objectives and principles that had been received by the IGC with a view to clarifying the key and divergent policy positions and issues, which the IGC would need to make informed decisions. This report⁶⁹ was transmitted to the IGC for its consideration at its 18th session (9–13 May 2011).

In the absence of agreement of the IGC, or other fora on these CBD issues, the international protection of GIs might provide a useful second-best solution. A number of the so-called ‘biopiracy’ episodes have involved the appropriation of biological resources, which are often sold under names that identify their geographical origin. The development of an international system for the protection of GIs might therefore also provide for the protection of biological resources.

Notes

1 Arrêt de la Cour du Parlement concernant la police des vins, 18 July 1764.

2 The Stresa Convention was ratified by Austria (12 June 1953); Denmark (2 August 1953); France (20 May 1952); Netherlands (29 October 1955); Norway (31 August 1951); Sweden (27 January 1951) and Switzerland (5 June 1951).

- 3 [1988] ECR-4907, 22 September 1988.
- 4 [1999] ECR 1, 4 March 1999.
- 5 WTO Doc WT/GC/W/249, 13 July 1999.
- 6 *Preparations for the 1999 Ministerial Conference the TRIPS Agreement Communication from Kenya on Behalf of the African Group*, WTO Doc WT/GC/W/302, 6 August 1999, para 26.
- 7 WTO Doc IP/C/M/27, para 77, 14 August 2000.
- 8 WTO Doc IP/C/W/204/Rev.1, 2 October 2000.
- 9 WTO Doc WT/MIN(01)/DEC/1, 20 November 2001.
- 10 WTO Doc IP/C/W/204/Rev.1, 2 October 2000.
- 11 WTO Doc IP/C/W/247, 17 May 2001.
- 12 Minutes of Meeting of the TRIPS Council, 2–5 April 2001, WTO Doc IP/C/M/30, para 92, 1 June 2001.
- 13 Ibid.
- 14 Ibid., para 87.
- 15 Ibid., para 88.
- 16 Ibid., para 89.
- 17 WTO Doc IP/C/M/29, para 103, 6 March 2001.
- 18 Ibid.
- 19 Ibid.
- 20 WTO Doc IP/C/W/289.
- 21 Ibid., attachment at para 13.
- 22 Ibid., attachment at paras 14–16.
- 23 IP/C/M/32, at para 112, 23 August 2001.
- 24 WTO Doc IP/C/W/289, attachment at paras 17–18.
- 25 WTO Doc IP/C/M/33, para 75, 2 November 2001.
- 26 Ibid.
- 27 The other proponents were the delegations of Bulgaria, Cuba, the Czech Republic, Georgia, Hungary, Iceland, India, the Kyrgyz Republic, Liechtenstein, Moldova, Pakistan, Slovenia, Sri Lanka, Switzerland and Turkey (WTO Doc IP/C/W/308, 2 October 2001).
- 28 WTO Doc IP/C/M/33, para 75, 2 November 2001.
- 29 Ibid.
- 30 Ibid., para 76.
- 31 Ibid., para 28.
- 32 The EC proposed amending Section 3 of the TRIPS Agreement with a view to extending the regime of protection today available for geographical indications on wines and spirits to geographical indications on all products ('extension') and, in addition, a proposal for the inclusion of an annex to the TRIPS Agreement establishing a multilateral system of notification and registration of GIs. World Trade Organization, General Council, Trade Negotiations Committee, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session on Geographical Indications, Communication from the European Communities 14 June 2005, WT/GC/W/547, TN/C/W/26, TN/IP/W/11.
- 33 'Since 1993, more than 700 names, designating *inter alia* over 150 cheeses, 160 meat and meat-based products, 150 fresh or processed fruits or vegetables and 80 types of olive oil, have been registered in this context. The Commission has also received over 300 further applications for the registration of names and/or amendments to specifications from Member States and third countries.' Proposal for a Council Regulation on the Protection of Geographical Indications and designations of origin for agricultural products and foodstuffs, Commission of the European Communities, Brussels, 5 January 2006, para 3.
- 34 See communication from Argentina, Australia, Canada, Chile, Ecuador, El Salvador, New Zealand and the United States, TN/IP/W/9, 13 April 2004.
- 35 WTO Doc TN/IP/W/10/Rev.2, 24 July 2008.
- 36 WTO Doc TN/IP/W/8, 23 April 2003.

- 37 Communication from Albania, Brazil, China, Colombia, Ecuador, the European Communities, Iceland, India, Indonesia, the Kyrgyz Republic, Liechtenstein, the Former Yugoslav Republic of Macedonia, Pakistan, Peru, Sri Lanka, Switzerland, Thailand, Turkey, the ACP Group and the African Group, TN/IP/W/52, 19 July 2003.
- 38 Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits, Report by the Chairman, Ambassador C. Trevor Clarke (Barbados), TN/IP/19, 25 November 2009, para 10.
- 39 Ibid., para 11.
- 40 Ibid., at para. 16.
- 41 Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits, Report by the Chairman, Ambassador Darlington Mwape (Zambia), TN/IP/20, 22 March 2010, para 4.
- 42 Ibid., para 5.
- 43 WTO Doc TN/IP/21, at para 15.
- 44 Ibid., paras 15–17.
- 45 Ibid., para 16.
- 46 WTO Trade Policy Review of the European Union, Statement by the United States to the WTO, 24 July 2002.
- 47 See variously, United States' first written submission, paras 137–40, 170; United States' first oral statement, paras 42–3.
- 48 *Gerolsteiner Brunnen GmbH & Co. v Putsch GmbH* (Case C-100/02).
- 49 The battle over the right to the name 'Budweiser' has pitted the world's largest brewer, Anheuser-Busch of the United States, against the 'boutique' Czech brewer Budějovický Budvar. The latter, based in the Czech town of Ceske Budějovice (also known as Budweis), claims it has been brewing a beer under the name since the 13th century, although the American beer has gained broader international reputation in recent years. See WTO, 1999: Preparations for the 1999 ministerial conference Agreement on TRIPS: Extension of the additional protection for geographical indications to other products. Communication from the Czech Republic, WT/GC/W/206.
- 50 WTO Doc WT/DS290/R.
- 51 For example, see European Communities Protection of Trademarks and Geographical Indications for Agricultural Products And Foodstuffs, complaint by the US, WTO Doc WT/DS174/R, 15 March 2005, para 7.139.
- 52 Ibid., at para 7.141.
- 53 A full technical and institutional appraisal is provided in the *Technical & Financial Cooperation for Implementation of the WTO TRIPS Agreement in Sierra Leone: Final Report of Needs Assessment Diagnostic*, ICTSD-Saana Consulting, October 2007. Available online at www.iprsonline.org/ictsd/LDCneeds.htm
- 54 See WTO Doc IP/C/W/499, 22 October 2008.
- 55 See WTO Doc IP/C/W/523.
- 56 WTO Doc, 'A Proposal For Modalities In The WTO Agriculture Negotiations, Specific Drafting Input by the EC', JOB(03)/12, 5 February 2003.
- 57 Ibid., at 3[V1].
- 58 WTO Doc JOB(03)/12/Add.1, 5 September 2003.
- 59 See WTO Doc 'Geographical Indications Communication from the European Communities', TN/IP/W/11, 14 June 2005.
- 60 IP/C/M/29, para 103, 6 March 2001.
- 61 Ibid.
- 62 Communication by the EC and its member states to the TRIPs Council on the review of Article 27.3(b) of the TRIPs Agreement, and the relationship between the TRIPs Agreement and the Convention on Biological Diversity and the protection of traditional knowledge and folklore, WTO Doc IP/C/W/383.
- 63 WIPO Doc WIPO/GRTKF/IC/8/11, 17 May 2005.
- 64 WIPO Doc WIPO/GRTKF/IC/17/10, 8 December 2010.

- 65 Ibid., Annex: 6.
- 66 WIPO/GRTKF/IC/17/10.
- 67 i.e., the 'Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications: Proposal by Switzerland' (WIPO/GRTKF/IC/11/10) and EU Proposal 'Disclosure of Origin or Source of Genetic Resource and Associated Traditional Knowledge in Patent Applications' (WIPO/GRTKF/IC/8/11) with a view to amending the Patent Cooperation Treaty (PCT) and the Patent Law Treaty (PLT) to reflect a mandatory disclosure requirement of the origin of the genetic resources.
- 68 WIPO/GRTKF/IC/16/7.
- 69 'Draft Objectives and Principles Relating to Intellectual Property and Genetic Resources Prepared at IWG 3', WIPO/GRTKF/IWG/3/17, 16 March 2011.

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2

SETTING UP A GI

Requirements and Difficulties at the Producer Level

Audrey Aubard

Introduction

Nowadays, every country in the world claims that their agricultural products, foods or traditional products belong to the cultural or gastronomic heritage of a country. Moreover, this differentiation by tradition and history is part of the national aspiration for economic development. The implementation of an added value policy for agricultural products and foodstuffs is often grounded in terms of a global strategy relying on rural and sustainable development (see UNIDO 2010; van de Kop et al. 2006). Products originating from a ‘terroir’ or a specific territory are those that belong to a collective regional, national heritage. These products must be economically valued for the local producers but also for the territory in which they are located and from which they derive their qualities.

Some countries, nowadays, are committed to ‘quality labelling’ strategies for products to first protect them and then differentiate them in the market(s). The success of such strategies is deeply linked with the collective approach of the producers, which enables them to structure the production chain. Collectively, producers are able to benefit from economies of scale (Barjolle et al. 2005) and to negotiate price premiums (Moschini et al. 2008). In establishing a collective organization which can coordinate promotional efforts, can concentrate on production (Réviron and Chappuis 2011).

Geographical indications are not a fanciful, theoretical tool, but must be designed pragmatically and realistically so as to be useful to business. The GI has to respond to the need identified by the product chains. Moreover, GI is not a panacea! Many producers think that once a GI is recognized, the markets will just open up for them. This is not true. Any demanding procedure to increase the value of products, such as GI, presupposes genuine management and marketing effort. However, it has been established that building a collective organization may lower the costs of launching a product in the market (Réviron et al. 2004).

The building of a GI strategy means the organization of the stakeholders to ensure the continued existence of the product. This aims at setting up real management systems, through an adapted organization for the product but also for the local realities, and able to manage the added-value strategy along the economic chain (see Barjolle and Sylvander 2000). A stakeholders' organization is an inescapable step for a GI strategy. It enables the assurance of the traceability of a product and compliance with specifications. Additionally, stakeholders take responsibility for strengthening product quality and in communicating with the marketplace.

To establish this kind of organization, different elements must be taken into account:

The ability of stakeholders to organize themselves;
the ability to work together;
the capacities development and strengthening on activities for which producers are not accustomed; and
human and financial means available.

There is no single model for a GI organization. For this reason, the present study will consider several examples of GI organization and issues to be useful for future GI stakeholders to find an adapted solution to their local specificities and their production practices.

The present chapter will deal firstly with general observation concerning the GI producers or stakeholders organization. Then, all the organization issues for a GI strategy will be considered.

The basics

General observation and GI interest

Modern civil society is seeking new, more human, more sustainable, fairer values. This demand for sustainable values is reflected in a return to authenticity, to what is genuine, and in the concern for passing on these values to future generations. When applied to the field of intellectual property rights and the marketing of products (agricultural or traditionally-made), this need for sustainability can be seen, particularly in developing countries, through the unstructured and often chaotic development of statements on products, logos, brands, etc. Consumers' need for reassurance has resulted in a proliferation of these messages, with the prime concern of producers being to get their product noticed on the shelves. The development of this style of marketing does not necessarily guarantee the protection of traditional know-how or a resurgence of producers' know-how. So producers need to take account of current requirements of markets, countries, consumers and citizens in relation to environment, health, traceability, origin, etc. GIs can meet some of these concerns. Moreover, producers embark on this kind of procedure in order to develop their business activity and increase their

income and protect their products. In developed countries today, consumers demand and perceive the differentiation (see Tregear and Giraud 2011).

GI management: General principles

GI, a collective right

GI is a collective right whose use is reserved for those who comply with a specification that they have defined, and approved by an appropriate authority. This implies that people meet and accept to share the implementation of a collective economic strategy. The duration of the use of the right coincides with the existence of the product.

Geographical indications are a collective tool. This presupposes that the members of the production chain of the product concerned share the GI strategy, are organized and have a long-term vision of this process. GI is a long-term process. The producers need to understand the GI system and why they are embarking on this procedure. Without understanding the mechanism, the advantages of the GI will never be able to be exploited fully. Moreover, the collective approach presupposes an organization of the sector (associations, cooperatives), which will enable it to exchange and develop the strategy and then to have a stronger market position.

GI, a local development tool

Geographical indications constitute a medium to create value-added locally. When the name of a product receives protection as a geographical indication, a positive impact can be created on local communities, in a number of ways:

Geographical indications can have a positive effect on demand and allow increased production and job creation (direct jobs and indirect jobs).

Geographical indications can assist producers in maintaining a price or obtaining a better price for their products in exchange for the guarantees offered to consumers concerning source, methods and quality.

Geographical indications can allow better redistribution of value-added throughout the production chain: from the producer of the raw material to the manufacturer. With geographical indications, all producers may be rewarded for their efforts to maintain quality. This strategy of differentiation, exploited collectively by farmers, allows them to obtain higher prices, compared with standard products, due to the typicality of their produce.

Geographical indications give the country of origin a reputation.

These effects can only be observed if the strategy is known about and if there are equal relationships between the stakeholders. It is important to codify know-how, but the existence of this product also has to be brought to the attention of customers and consumers. As a consequence, GI also presupposes that product marketing will be put in place.

Dialogue between stakeholders

For the GI system and a GI strategy to function, it is necessary to create an exchange between the various stakeholders, including public and private sector:

the appropriate regulatory authorities (industry/intellectual property, fraud, agriculture, crafts, culture) at every level: national, regional, etc.;

the representatives of producers (by sector, associations of producers);

consumers' associations, where they exist;

public or private audit bodies;

universities (agricultural science, history, geography, law, sociology, etc.); and

NGOs in certain countries.

The appeal of this participatory approach lies in the interest of all stakeholders being taken into account:

views and resources of national or local administrations;

needs of producers and sectors;

consumers' expectations;

views and procedure of audit bodies;

support and investment by academics (transfer of knowledge and putting expertise in place); and

transparency for all.

Some of the stakeholders can then take over the project in regard to a territorial development policy, setting up some agro-tourism programmes, encouraging the communication and the promotion of local products (national campaigns or traditional market during holiday times) or giving subsidies to the producers (for example, to build the association, to finance the certification or the promotion).

These exchanges and inter-complementarities between players will enable feasibility of projects to be analysed more closely, and have the strategy shared and accepted.

The motivations of stakeholders

GIs constitute a new legal instrument in quite a number of countries. Its recognition on an international scale, particularly because of the TRIPS Agreement, makes it attractive because it meets the needs of producers and consumers on a global basis and enables them to commercialize their local and national heritage.

GIs are a tool that enables structuring of commercial enterprise. This collective, shared approach appeals to businesses, which are increasingly showing willingness to band together, particularly since faced with the globalization of markets, producers are stronger together than individually, particularly when dealing with intermediaries.

GIs can enable product differentiation giving them stakeholders more ‘value’ than those of the competition, and protecting the producers from usurpations and abuses of their reputation. So, GIs must meet strategic requirements:

Motivation elements
• Differentiate its products from those proposed by competitors
• Protection of products and their history
• Give a guarantee of an origin and a specificity of the product
• Lack of organization of production
• Protection of traditional designations against abuses and unfair competition
• Protection and preservation of production sectors
• Wish to increase the value of traditional products
• Wish to build economic sectors and research of improved credibility in the marketplace
• Ensure a collective communication on the product
• Positioning of a product differentiated by its quality and origin
• Developing a territorial dynamism

FIGURE 2.1

A GIs project needs to gather some strategic elements before setting up the system. Sometimes these elements can take time to be understood and accepted. Then, once the stakeholders decided to commit themselves to the GI strategy, they must be organized in technical terms but also in terms of governance.

Organization and management of GIs by producers

As an introduction

In order for producers’ organizations to find something useful for them in GIs that will bring them the results they hope for, the following basic conditions must be met.

Political will and legislative supervision: GIs must be defined and framed by legislative and government bodies. Some countries anticipate in their laws some of the specific conditions concerning the nature of the GIs, the applicants or the representativeness of the producers.

People, producers who organize themselves: GI products rely on the people who are producing and processing them. Without the willingness of these stakeholders to work together and to share a strategy on the product, a GI will not exist, even if the product is GI-eligible. GIs involve a collective procedure and aim to preserve an element of the cultural or gastronomic heritage of a country. Consequently GIs have a *raison d’être* when driven forward by the majority of business operators who are working on the product concerned.

Product history: a GI protects first a name attached to a product (agricultural, foodstuff or handicraft). This product belongs to the history of its territory (ways of production, know-how transferred from generation to generation, specific characteristics and reputation). This product and its name are not fanciful but have markets. This market and the future ones need to be protected. This name benefits from a reputation and a history. These factors are relevant to the construction of the GI for the products.

A product strategy defined by the producers: GIs must be useful for stakeholders. So the choice of GI choice must meet their economic needs (protection, market access, marketing and quality management).

A marketing and sales strategy: this must bring the products to life and conquer markets. Stakeholders must bear in mind that the GI tool must benefit from a communication programme to be known by the customers and the consumers. If not, all efforts will be in vain.

The feasibility of a GI: Elements of organization and management

Several stages have to be followed and implemented during the creation and the life of a GI.

Situation review

Where a product has been identified and possesses a name linked with its territory of origin and characteristics due to its geographic origin and enjoys a reputation among customers and consumers, how can producers enhance the value of their product? First of all, it should be ascertained whether there is a legal system governing GIs in the country concerned. A search for this can be undertaken either at the Intellectual Property Office or among the technical ministries concerned by the product (Ministry of Agriculture or Ministry of Traditional Craft Professions).

For example, in Jamaica, there is no *sui generis* regulation on GIs, although its Blue Mountain Coffee is already the subject of a quality procedure. However, the name can only be protected by a trademark, which limits the scope, the duration of the protection compared with a GI and increases the costs of protection (see Schübler 2009).

If countries have already put in place a policy of enhancing the value of products, this exercise is facilitated because in most cases, producers will have been familiarized and made aware of the concepts. For example, in Morocco at the beginning of 2009, on the occasion of the announcement of the GI/AO system for agricultural products, the Ministry of Agriculture organized a large media event for producers. Several eligible products were invited to evaluate this new system: Argane oil, Tyout olive oil, Taliouine saffron, Berkane clementine, etc. Today, these products have been registered as GIs, or are in the scrutiny process.

One point is essential for the Intellectual Property Offices or other public institutions: farmers, particularly in poor countries, are unfamiliar with the world of industrial

property, and are therefore unaware of what is involved. This means that these institutions have to organize themselves so as to be visible and understood by producers. Then, producers will have to examine the procedure that will be imposed on them: forms, drafting of the application, duration of the procedure, contact person, etc. In this regard, the appropriate authorities will have to be available and receptive to future applicants.

A product, a strategy

All 'geographical named products' cannot be regarded as potential GIs. The general definition of a GI or appellation of origin requires a quality link between the product and its geographical origin. So it is really important to identify, through an appropriate methodology, products that can be registered. There must be a concept of quality product management (through specifications and control or certification processes).

So once a product tied to a geographical location is identified, its name must be linked with the territory and its characteristics and quality must be tied to its geographical origin. These are the elements that make this product different from similar products. This is especially the case if this product has existed in this location for several decades or centuries, and the geographical area enjoys a reputation because of this product.

The most relevant pieces of evidence required to identify the need for producers to recognize their product as a GI are:

- A product with a name (geographical or not but with a geographical meaning);
- a traditional product, linked with its territory;
- a reputation of this specific product (local, national or international level);
- the need of protection for the product's name and the product itself; and
- the protection of their markets, by guaranteeing that the GI product is the real one (in relation to the competitors or counterfeiters).

Producers must first express a wish to differentiate this product in the marketplace, so that it is not confused with similar products that do not have the same characteristics and also to protect the name of this product, in order to enhance its value and avoid it being confused with competitors. The enhancement of this product by a GI could enable current markets to be consolidated, new markets acquired and to increase consumer loyalty.

For example, in Jamaica, the GI strategy in relation to Blue Mountain Coffee came about not to expand markets, but to safeguard the use of the name. This coffee is famous for its characteristics and quality, which make it unique. A lot of work has been done over several decades by the Blue Mountain Coffee producers, particularly in relation to quality and protection (certification mark, protection of the area of production). These efforts have enabled this product to be established in the marketplace, particularly in Japan. The GI in this case will consolidate the protection of the product, so that usurpations are eliminated, and to set genuine Blue Mountain Coffee apart from imitations.

Often, the market risks entail the setting up of a GI in order to consolidate existing sales and avoid the disappearance of producers.

Organized men and women

Once the GI strategy has been properly identified and defined, the project organization or future association has to structure itself. Players in the sector will have to be identified: producers, or producers plus processors, and other associated members. For countries where there is no professional/producers associations tradition, the collective aspect of GIs can be an advantage. In ACP countries, and in Asia, collective organization is not yet usual practice. So, what type of organizational structures are we referring to? They can vary: producers' organizations, associations, cooperatives, syndicates, etc. The legal structure is not that important. What is important is to meet together to share a joint strategy: the GI.

For example, in Côte d'Ivoire, producers of Korhogo clothes would have something to gain from organizing their profession (Aubard 2010). In the absence of a collective structure, buyers are imposing prices. A collective organization in relation to a GI would enable them to define collectively the qualitative rules for production, involve themselves more in the marketing activities and define a collective approach towards buyers. In Burkina Faso or Morocco, women producing Karité butter or Argane oil received support and funding so that they could organize themselves. Most of them adopted the cooperative approach. Producers now adopt strategies aimed at improving their income.

The procedure for organizing the sector must be participatory. The project needs to be initiated with all or most of the players in production, to avoid certain producers being boycotted. The project is shared and if, at a later stage, some do not want to participate, that is a matter for their own business strategy.

This collective organization has a special duty in participating in awareness-raising activities on the subject so that all producers can understand the GI system and sign up to it.

Once the collective organization has been set up, it needs to choose a collective legal status and file its articles of association. This group will constitute the anchor point of the GI: a forum between producers, and between producers and the administration. It will be the legitimate entity for representing and managing the GI. It will have to elect a president who will represent the sector and can disseminate experience.

In addition, this organization needs to be given what it requires for the long-term, particularly funding. Membership dues will be requested, and a person will have to be recruited to run the organization and the daily management of the GI (see below). This also supposes that the organization has working capital to ensure that it can survive long-term.

A collective and shared dimension

A collective marketing strategy required for the deployment of a GI needs a collective approach. In each GI feasibility study, the willingness of the stakeholders to work together and to share a strategy has to be assessed. This may explain the capacity of

the stakeholders to lead this GI strategy and then their capacity to be regarded as a real and strong group of producers to defend their product in front of the intermediaries, purchasers.

Without any accepted leader inside the GI producers' association, the potential success of the project will be endangered. There is no common rule: there can be one or several people who assume leadership roles. Sometimes, this leadership issue tends to be problematic because of the competitiveness of the different producers or the different kinds of players. One of the solutions is to draw a specific rule on the presidency: changing every six months so that everybody will be represented.

This GI association or group (it can be an association, a syndicate, a cooperative, etc.) has special duties. Indeed, this association is firstly the focus point between the state and the producers. It also decides collectively the GI product policy and strategy: level of quality, marketing, content of specifications and agreement on the control body. It means the GI group has to provide a collective management, which is sometimes difficult to achieve, especially when stakeholders are used to working alone. This aspect can take time to be built.

Definition of the specifications

Once the strategy has been defined and the group set up, it will be necessary to put together the application for the GI. This application consists, in particular, of a specification that consists normally of the following subjects:

- the product name to be protected by the GI;
- the type of product;
- the definition of the mode of production;
- the chosen geographical area and its characteristics;
- the link between the product and the geographical area (this link can relate to the characteristics of the product, its reputation, etc.);
- the product characteristics;
- the name of the control organization;
- labelling, if appropriate; and
- other specific rules if required by the product national regulation.

Within the group, working sessions will have to be arranged, with the producers of the future GI, as well as any persons who can provide useful information (for example, researchers, administrations, associations of consumers, networks of associations, NGOs, etc.). The work must be participatory. The content of the specification must not be imposed by a small clique or the administration in charge, which would make it difficult to get it applied afterwards. The prime objective is to record the history and the production practices.

The specification must reflect the reality of the production of the product without being prejudicial to the concerns for health, hygiene, safety and public order. It must also be accepted by all the stakeholders.

Finally, the content of the specification should not be overloaded, but limited to the essentials. Groups frequently want to write down everything. This is not essential. By writing down everything, there is a risk that producers will be deterred and the specifications will strike them as complex. In addition, it should be borne in mind that any point that appears in the specification will have to be reflected in the control plan. The more streamlined the basic document without removing its substance, of course the less inconvenient the controls will be for the producers.

Definition and organization of the controls

The existence of a quality procedure for a product means the implementation of controls on the commitments given by producers. Several types of control could be implemented to guarantee compliance with the production conditions by producers.

This also presupposes that members of the GI group will submit to a collective discipline and accept the constraints that this implies.

GI controls can be organized in two ways: (i) by the commitment of public bodies such as fraud control groups or official laboratories; or (ii) through a private certification and monitoring system operated by a third party. Generally speaking, certification is considered to be more expensive than public controls. Not all of the GI producers can afford such controls, particularly in developing countries and LDCs.

Within the GI system, the controls are not required to be provided to each producer because of the collective approach. The control plan can foresee a percentage of producers to be controlled each year, meanwhile an internal control is provided by the GI association. This organization can reduce considerably the costs for the producers.

The controls and particularly certification will be organized as shown in Figure 2.2.

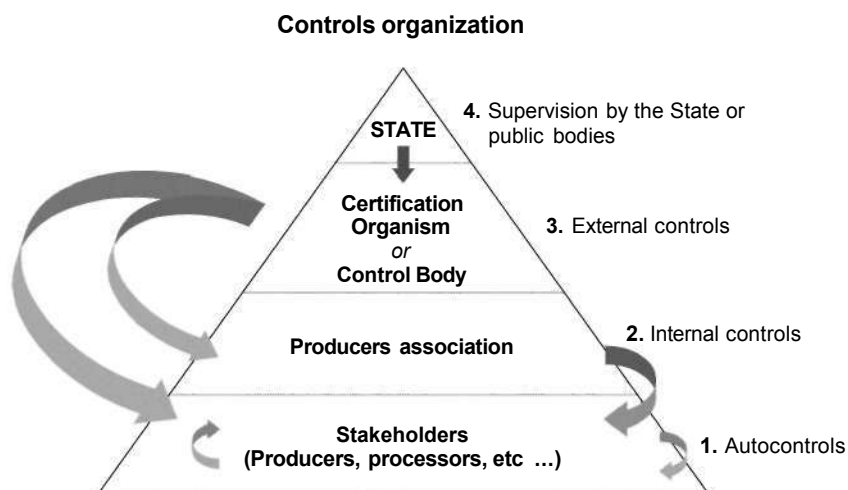


FIGURE 2.2

In developing countries in particular, some producers may be illiterate. Therefore the controls acceptable to foreign certification bodies may need to be adapted, hence the importance of capacity building and education. The group of producers can support these practices as well, and identify the points to be checked when auditing producers.

The plan of controls and traceability will also have to be designed in concertation between the GI group and the control body that is selected.

For products that are not intended for export, some public controls or a single supervision can be enough. On the other hand, if the product tends to be exported, the certification system will make product acceptance by customers and consumers easier, and will then enable the exports. In any case, stakeholders must verify the mutual recognition of the control mechanism between the country of origin and the country of destination to avoid the product refusal at the entrance of the country where it is being exported.

Recognition process

When the stakeholders, gathered in association or group, have worked on the specifications, accepted them and built a draft of a control plan, then it is time to submit the GI application to the appropriate institution. The group must ensure that all the documents required by the regulations are submitted, such as required forms, association statutes, specifications and fees if required.

The recognition procedure presupposes exchanges between the group of producers, the appropriate institution and the objectors, if there are any. The group will have to make sure that it provides all the answers required and prepares its defence in the event of objections.

Sometimes the national procedure can be long, which can discourage the stakeholders from following the strategy. The procedure of GI recognition must comply with the economic needs of private sector.

Marketing and markets

Once the GI is recognized, the work does not stop there. It will be necessary to publicize among producers the commitments given by them, particularly to assure the guarantees given by the product recognized under a GI. Communication of this quality procedure will have to be arranged (press conference, seminars, etc.).

The group will also have carried out market research beforehand and corresponded with customers regarding their commitment to the procedure. If markets are not receptive to the GI due to lack of interest or affordability, it is not necessarily useful to embark on this work. Incidentally, GIs are often linked to niche markets. However, this assertion is not necessarily true. Products occupying large markets (such as PGI Colombian Coffee) can have a GI. A GI can be adapted to any kind of market.

Trademarks should not be overlooked: any product covered by a GI is also sold under brand names/trademarks. Everything depends on the size and composition of

the sector. More often than not, the GI group defines a graphic charter where compliance with the GI and company brand names is taken into account.

For example, the establishment of Jamaican Blue Mountain Coffee as a GI has both reinforced the protection of the commercial name and combated fraudulent imitations. In this case, the marketing campaigns and commercial image enhancement were carried out beforehand. The GI enabled all these efforts to be consolidated.

As an example, in Côte d'Ivoire, sales of Korhogo cloth had been declining. The marketing of this cloth was dependent on tourism. In view of the collapse in tourism due to the political upheavals in the country, the sector has had to look for new markets. GIs could be used to enable customers to be assured about the quality and provenance of this cloth and thus allow producers to reorganize their markets.

GIs are not necessarily tied to export markets. So, if stakeholders want their product to be recognized or registered as a GI, they can first develop their national or regional market. It can be enough for them. Good GIs strategies and GIs success stories can be developed only at a national stage, before exports are contemplated. GIs allow first the strengthening of current domestic markets and prices. If the GI strategy is managed correctly, then other markets may be penetrated and prices may reach higher value.

Day-to-day management of the GI

GI daily tasks

Once the GI is recognized and/or registered, the collective organization must continue to exist since it will be responsible for maintaining the GI procedure. Once registered, a huge amount of work must be done by the association to support producers to set up, manage and promote the GI product. The group of producers must guarantee representativeness of business operators and a balanced representation of the various categories of businesses. This will make it acceptable as being legitimate for all stakeholders.

The group will draw up the draft specifications for the GI and manage its implementation among operators: dissemination, explanation, management of (internal) audits. It will ensure that the sector knows the statistics, that the product's image is enhanced; the name is protected as is that of the region. To summarize, management of the GI implies several kinds of duties:

- Monitoring of the specifications and compliance with the rules;
- when appropriate, modifying the specification and proposing modifications to the competent authorities;
- the chain of the production;
- ensuring the knowledge of the market(s) and the prices;
- monitoring the use of the GI by producers and interlopers, as well as trademark protection (where collective or certification marks have been registered);
- organization of communication programmes;
- organization of the association meetings;
- management of the budget of the GI group (which has to be perennial); and
- being the focus point with public bodies or other institutions.

Not all GI groups perform all these tasks because some members prefer keeping some information for themselves and not sharing it collectively.

Budget aspects

The financial issue is the principal problem faced by the stakeholders. A GI and its collective structure need financial means to survive. GI is a business tool. It is a living tool that has to be kept alive. For example, the costs of protecting the GI Blue Mountain Coffee in Jamaica are sizeable: between \$US250,000 and \$US400,000. Not all groups can afford to have such large budgets.

The definition of the budget will depend in part on:

Tasks allocated to the association;
the effective activity of the structure, depending on the seasonality of the product; and
competencies granted to the association by the stakeholders.

The main budget lines to foresee are:

Employee(s) wages
Running costs (office, trips and statutory meetings)
Controls, certification
Communication
Other costs: studies, legal expenses, etc.

With these elements, it is possible to elaborate a synthesis of what could be the GI association budget, including the following costs:

Meetings
Studies (to build the specifications, to bring evidences etc.)
Settlement of the association
Location
Communication
Controls
Legal costs, if necessary.

Based on these budget lines, some producer associations may be eligible for subsidies according to the national decisions. These subsidies can support the costs of the scientist studies (definition of the quality product, building of the GI strategy), some running costs, communication promotion or control.

Summary of producers' group activities

A summary of the different activities that can be managed by the GI association are outlined below. All of these activities are not necessarily compulsory for the success of a GI project.

Specifications and controls:

Writing the GI specifications and its modifications if necessary
Disseminating the specifications to those who will use them, for example producers and processors
Management of the control/certification system
Establishing linkages with a certification body
Place of exchange and discussions on the specification contents and its implementation

Production process:

Enhancing the quality of the product, providing a technical assistance and information (updates) to the producers
Following the producers on certain certification system (specifications, HACCP, norms, etc.)
Gathering statistical information on the production chain

Marketing aspects:

Enhancing the producers' negotiation margin, providing them guarantees on quality
Setting up marketing collective strategies (useful for small associations)

Communication aspects:

Promoting information about the product on the markets
Implementing the collective communication strategy
Partnership with different institutions that can take part in product promotion
Being present in important fairs or other events
Working on the creation 'visuals': trademark, website for the GI, including the development of labelling protocols

Representational activities:

The GI association represents the GI product among all the stakeholders (mainly public bodies)
Forum for all actors in the chain of production
Ensure the continued existence of the product

Protection:

Registering the GI in all relevant markets
Monitoring the use of the GI in the country of origin and abroad
Defining and implementing a strategy for protection of the GI
Ensuring that labelling protocols are complied with

Conclusion

Geographical indications first and foremost have an economic function. They should be considered as a strategic tool for business sectors, an investment in the future. This consideration may make acceptable all the constraints defined above.

The system needs to be simple and suited to the reality in the country and the needs of the producers. There is no standard pattern for setting up GIs, and copying systems that are too old and too complex should be avoided.

Once the GI is correctly set up, it will constitute evidence of credibility for businesses in the sector as well as for consumers. To do this, it is necessary to communicate about the commitments given and all the efforts made by the producers.

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3

LEGAL INFRASTRUCTURE FOR THE PROTECTION OF GIs

Michael Blakeney

Introduction

The TRIPS Agreement does not prescribe the way in which countries must protect GIs. The choice of GI protection regime which countries may choose will depend partly on their legal tradition and partly on the legal regime that obtains in target markets. Francophone countries have tended to follow the French precedent of *sui generis* laws to protect GIs. Cameroon, Gabon and Senegal, as signatories of the March 1977 Bangui Agreement on Intellectual Property which set up the Organisation Africaine de la Propriété Intellectuelle (OAPI) that governs the protection of intellectual property rights in 16 countries of Western and Central Africa have in place regional *sui generis* legislation for the protection of GIs. Annex VI of the Bangui Agreement, as last amended in February 1999, provides for the protection of GIs. The scope of application of the GI Law of Annex VI is more extensive than the scope of the EC system, as it applies to all agricultural, craft or industrial products (Article 1). Morocco has enacted a national *sui generis* GIs law.¹

In the Anglophone African countries, GIs have tended to be protected as certification or collective trademarks. However, a number of Anglophone countries are in the process of implementing *sui generis* GI protection. Ghana passed a Geographical Indications Law in 2003 and Zanzibar enacted the Industrial Property Act 2008 with provisions for GIs, but neither have promulgated implementing regulations. In Rwanda, the legislative framework for registration and protection of GIs consists of Law No. 31/2009 of 26 October 2009 on Protection of Intellectual Property. Mauritius enacted a GIs Law in 2002, but this has not been implemented and since that date it has commissioned the drafting of further GIs laws in the context of drafts of industrial property legislation commissioned in 2009/2010. Kenya is currently developing a draft GIs Bill. Nigeria and Tanzania, other than Zanzibar, have no national GIs legislation. In general, geographical marks are not registrable under the

trademarks' legislation of the countries surveyed, other than as collective and certification marks.

Of course, the choice of GI protection regime that countries have chosen depends partly on the legal regime that obtains in target markets. For example, the EU is quite familiar with GIs and African countries seeking to take advantage of GI registration in the EU will be obliged to establish national GI regimes, as EU registration will depend upon a prior home country GI registration. On the other hand, in the US, collective and certification mark protection of GIs is the norm.

OAPI

Cameroon, Gabon and Senegal, whose industries are surveyed in the case studies below, are signatories of the 1977 Bangui Agreement on Intellectual Property, which set up the OAPI. The Bangui Agreement was revised in 1999 and entered into force in February 2002. Other parties to the Agreement are: Benin, Burkina Faso, Central Africa, Chad, Congo, Côte d'Ivoire, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Mauritania, Niger and Togo. The OAPI Agreement embodies the national IPR laws of the member states and therefore applies directly in each member state. All the member states of the OAPI are party to both the Paris Convention and the TRIPS Agreement. Burkina Faso, Congo, Gabon and Togo are also parties to the Lisbon Agreement.

Annex VI of the Bangui Agreement provides for the registration and protection of GIs. Registration of GIs is undertaken by OAPI on behalf of its member states. Article 15(1) of Annex VI provides that 'only producers carrying on their activity for commercial purposes in the geographical area specified in the Register shall have the right to use a registered geographical indication with respect to the products specified in the register, provided that such products possess the essential characteristic qualities specified in the register'. The protection of GIs as required in Article 22 of TRIPS is provided in Article 15(5) of Annex VI, which provides that 'it shall be unlawful to use in the designation or presentation of a product any means that infers or suggests that the product concerned originates in a geographical area other than its true place of origin in a manner likely to mislead the public as to the geographical origin of the product'. The additional protection of registered products, along the lines of Article 23 of TRIPS, is provided by Article 15(3), which states that 'it shall be unlawful to use, for commercial purposes, a registered geographical indication, or a similar designation, with respect to the products specified in the Register or similar products, even if the true origin of the products is indicated or if the geographical indication is in the form of a translation or is accompanied by terms such as "kind", "type", "make", "imitation" or the like'.

Annex II, Title V of the Bangui Agreement provides for the registration of collective marks 'in the general interest and in order to facilitate the development of commerce, industry, crafts and agriculture, the State, public companies, unions or groups of unions and associations or groups of producers, manufacturers, craftsmen and tradesmen' provided that they are officially recognized.² Article 33 provides that 'collective marks shall be affixed either directly by the groups mentioned above as a means of control,

or by members of the said groups on the goods or objects traded by them' and that this shall be done 'under the supervision of the group concerned and in accordance with the provisions of the texts governing the collective marks in question'. Article 34 provides that 'the application for registration of a collective mark shall include the approved rules for its use'.

ARIPO

Of the other countries surveyed, Ghana, Kenya, Tanzania and Uganda are members of the African Regional Intellectual Property Organization (ARIPO) established by the Lusaka Agreement, adopted in December 1976. Other ARIPO member states are: Botswana, Gambia, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Zambia and Zimbabwe, with Mauritius having observer status. Unlike the Bangui Agreement, the ARIPO Agreement does not contain an IPR code which is applicable in member states, but seeks to consolidate the resources of its member countries in industrial property matters in order to avoid the duplication of work. The Banjul Protocol on Marks, which was adopted by the Administrative Council in 1993, establishes a trademark filing system. Under the Banjul Protocol, an applicant may file a single application either at one of the contracting states or directly with the ARIPO Office and designate states where protection of the mark is sought. The Protocol deals only with trademarks and not with GIs. Current parties to the Banjul Protocol are Botswana, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zimbabwe. It is expected that other ARIPO member states will ratify or accede to the Protocol in the near future.

Bilateral and regional FTAs

The difficulties of securing an international consensus on the details of the international intellectual property regime, including details of the scope and machinery for the protection of GIs, has induced countries to negotiate bilateral arrangements. Indeed, during the Uruguay Round of TRIPS, the US modified section 301 of its Trade Law to facilitate its intellectual property goals and linked its Bilateral Investment Treaty (BIT) and Free Trade Agreement (FTA) programmes to the same objectives (see Abbott 1989: 712). As was mentioned above, section 301 of the US Trade Law was strengthened as a negotiating stratagem to encourage the successful conclusion of the TRIPS Agreement. Emory Simon, the Director for Intellectual Property at the USTR, indicated in a speech in 1989 that the first consequence of the failure to secure TRIPS 'will be an increase in bilateralism' (Drahos 2001), as the invariable conclusion to a section 301 dispute would be a bilateral arrangement between the US and the country considered to be recalcitrant. In the years immediately succeeding the promulgation of TRIPS, the US in negotiating its BITs, as well as its FTAs, included an intellectual property chapter with a view to securing objectives that were more difficult to secure multilaterally, either in the WTO or in WIPO.

Thus, for example, the US conception that the protection of GIs was adequately secured through trademark protection was reflected in its 2004 FTA with Australia, which provided in Article 17.2.12(b) that:

where a Party provides the means to apply for protection or petition for recognition of geographical indications, through a system for the protection of marks or otherwise, it shall accept such applications and petitions without the requirement for intercession by a Party on behalf of its nationals, and shall:

- (i) process applications or petitions, as relevant, for geographical indications with a minimum of formalities;
- (ii) make its regulations governing filing of such applications or petitions, as relevant, readily available to the public;
- (iii) ensure that applications or petitions, as relevant, for geographical indications are published for opposition, and provide procedures for opposing geographical indications that are the subject of applications or petitions. Each Party shall also provide procedures to cancel any registration resulting from an application or a petition;
- (iv) ensure that measures governing the filing of applications or petitions, as relevant, for geographical indications set out clearly the procedures for these actions. These procedures shall include contact information sufficient for applicants or petitioners, as relevant, to obtain specific procedural guidance regarding the processing of those applications or petitions; and
- (v) provide that grounds for refusing an application for protection or recognition of a geographical indication include the following:
 - (A) the geographical indication is likely to cause confusion with a mark that is the subject of a good-faith pending application or registration; and
 - (B) the geographical indication is likely to cause confusion with a pre-existing mark, the rights to which have been acquired through use in good faith in the territory of the Party.

Similar provisions are contained in Article 14.2 of the US-Bahrain FTA (2004) and Article 14.2 of the US-Peru FTA (2005).

At the other end of the spectrum, the EU, which is the partisan of trademarks plus protection for GIs, has adopted the US approach of including its intellectual property objectives in bilateral agreements. A recent example is the Economic Partnership Agreement between the CARIFORUM States³ and the EU and its member states.⁴ Article 145 of this Agreement provides:

2. The Signatory CARIFORUM States shall establish a system of protection of geographical indications in their respective territories no later than 1 January 2014. The Parties shall cooperate through the CARIFORUM-EC Trade and Development Committee in accordance with the provisions of

Article 164(2)(c) towards the development of geographical indications in the territories of the CARIFORUM States. To this end, and within six months from the entry into force of the Agreement, the CARIFORUM States shall submit to the consideration of the CARIFORUM EC Trade and Development Committee a list of prospective Geographical Indications originating in the CARIFORUM States for its discussion and comments.

3. The Parties shall discuss within the CARIFORUM EC Trade and Development Committee the effective implementation of this Article and exchange information on legislative and policy developments on geographical indications.

B. *Term of protection*

1. Protection afforded in respect of geographical indications in the EC Party and the Signatory CARIFORUM States shall be granted in accordance with the legal system and practice of the EC Party or the relevant Signatory CARIFORUM State as the case may be, and shall be indefinite.
2. Such protection shall ensure that the use of geographical indications of goods protected pursuant to paragraph 1 be exclusively reserved in the EC Party and the Signatory CARIFORUM States to goods originating in the geographical area concerned and that are produced in accordance with the relevant product specifications.
3. In respect of the protection of geographical indications, the EC Party and the Signatory CARIFORUM States shall prohibit and prevent, *ex officio* or at the request of an interested party:
 - (a) regardless of the class of product on which it is used, the use in their territory of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the true geographical origin of the good; or any other use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention;
 - (b) any use of the protected names for goods in the same class of product as the geographical indication which do not originate in the geographical area indicated, even where:
 - (i) the true origin of the good is indicated;
 - (ii) the geographical indication in question is used in translation;
 - (iii) the name is accompanied by terms such as 'kind', 'type', 'style', 'imitation', 'method' or other expressions of the sort.
4. It shall be possible to cancel the registration of a geographical indication. The procedure to this effect shall allow for the participation of any natural or legal person having a legitimate interest. ...

5. Homonymous geographical indications shall be protected by the EC Party and Signatory CARIFORUM States provided that there is a sufficient distinction in practice between the geographical indication first protected and the homonym subsequently protected, having regard to the need to treat the producers concerned in an equitable manner and not to mislead consumers. A homonymous name that misleads the consumer in to believing that products come from another territory shall not be protected by the EC Party or the Signatory CARIFORUM State concerned.
6. If a geographical indication of the EC Party or Signatory CARIFORUM State is homonymous with a geographical indication for a third country, Article 23(3) of the TRIPS Agreement applies *mutatis mutandis*.

D. *Relationship between geographical indications and trade marks*

1. A geographical indication shall not be registered in the EC Party or the Signatory CARIFORUM States where, in the light of a trade mark's reputation and renown and the length of time it has been used, registration is liable to mislead the consumer as to the true identity of the product.
2. From the date of entry into force of this Agreement, the registration of a trade mark which is identical with, similar to or containing a geographical indication protected respectively in the EC Party or in the Signatory CARIFORUM States pursuant to section B and relating to the same class of product shall be refused respectively in the EC Party or in the Signatory CARIFORUM States. Furthermore, the registration of a trade mark in such circumstances shall be refused respectively in the EC Party or in the Signatory CARIFORUM States if the application for registration of the trade mark was submitted after the date of application for protection of the geographical indication in the territory concerned and the geographical indication is subsequently protected.
3. Trade marks registered in breach of the preceding paragraph shall be invalidated.
4. The EC Party and the Signatory CARIFORUM States shall ensure that, subject to the provisions of section D(1), (2) and (3), a trade mark, the use of which corresponds to one of the situations referred to in section B(3), and which has been applied for, registered or established by use, if that possibility is provided for by the applicable legislation, in good faith within the territories of the EC Party or of a Signatory CARIFORUM State, before the date of application of the WTO obligations in the EC Party or a Signatory CARIFORUM State, or before the date of application for protection of the geographical indication in the respective territories, may continue to be used notwithstanding the registration of the geographical indication, provided that no grounds for the invalidity or revocation of the trade mark exist as specified by the legislation of the EC Party or of the concerned Signatory CARIFORUM State. In such case, the use of the geographical indication shall be permitted alongside the relevant trade mark.

E. Future protection agreement

The EC Party and the Signatory CARIFORUM States shall no later than 1 January 2014 commence negotiations aimed at an agreement on the protection of geographical indications in their respective territories, without prejudice to any individual requests for protection that may have been filed directly.

F. Internet use

The EC Party and the Signatory CARIFORUM States accept the need for a clear legal framework for geographical indications owners who wish to use their geographical indications on the Internet and to participate in the development of electronic commerce which includes provisions addressing whether the use of a sign on the Internet has contributed to the usurpation, evocation, acquisition in bad faith or infringement of a geographical indication or whether such use constitutes an act of unfair competition, and a determination of the remedies, including the eventual transfer or cancellation of the domain name. In this respect, the EC Party and the Signatory CARIFORUM States shall endeavour to apply the Joint Recommendation concerning the protection of marks, and other industrial property rights in signs, on the Internet, as adopted by WIPO at the Thirty-Sixth Series of Meetings of the Assemblies of the Member States of WIPO, 24 September to 3 October 2001.

In addition to the intellectual property chapters of FTAs, the EU has also entered into specific GI agreements with countries with which there have been problems of conflict. These have typically involved wines and spirits. The most recent of these is the Australia-European Community Agreement on Trade in Wine, which was signed in Brussels on 1 December 2008.⁵ Article 12 of the Treaty provides for the protection of geographical indications listed in Annex II and traditional expressions listed in Annex III, as well as 'the categories of wine referred to in Article 54 of Council Regulation (EC) No 1493/1999 on the common organisation of the market in wine relating to quality wines produced in specified regions' referred to in Annex IV and V and 'the sales descriptions referred to Council Regulation (EC) No 1493/1999 on the common organisation of the market in wine relating to quality wines produced in specified regions'. Reciprocally, Article 12 provides for the protection of GIs in relation to Australian wines listed in Annex II. Annex II lists the geographical wine-producing regions of each of the EU member states. The traditional expressions referred to in Annex III include all the European appellations registered for wines.

An agreement on trade in wine between South Africa and the EU was signed in January 2002.⁶ Under the agreement, South Africa agreed to phase out the use of the European names 'port' and 'sherry'. Annex II to the agreement on wine contains a full list of GIs for wines that will be protected. In return for agreeing to phase out the use of these names, the EU provided import aid (€15 million) for restructuring the South African wine and spirits industry and the import quota for South African wines

was increased from 320,000 hectolitres to 420,000 hectolitres per year. The parties concluded that at the end of an agreed period, the new denominations of these products would be used on the South African domestic market. These denominations would be jointly agreed between the Republic of South Africa and the EU. An Agreement between the EC and South Africa on Trade in Spirits was signed on the same day as the agreement on trade in wine.⁷ The Agreement lists the GIs for spirits that are protected under it. This includes the obligation for South Africa to phase out the use of European terms 'Grappa', 'Ouzo', 'Korn/Kornbrand', 'Jägersee/Jägersee/Jägersee' and 'Pacharan' after a transitional period of five years, which commenced on 1 January 2002. Both agreements concluded by the EU and South Africa were part of the general Trade, Development and Cooperation Agreement (TDCA) concluded in October 1999 (see Craven and Mather 2001).

A number of African countries are parties to bilateral FTAs and BITs which contain an IP chapter that adds IP obligations to those imposed by the TRIPS Agreement (see Fink and Reichenmuller 2005; Mercurio 2006). The BITs into which the US had entered into with Cameroon, the Democratic Republic of Congo, the Republic of Congo and Senegal require each party to 'maintain a favorable environment for investments in its territory by nationals and companies of the other Party under its laws, regulations and administrative practices and procedures, and shall permit such investments to be established on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable'. 'Investment' is defined to include 'intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know how, and goodwill'.

IP provisions are contained in a number of regional trade agreements which apply to a number of the countries surveyed below. Article 24 of the protocol on trade in the treaty establishing the Southern Africa Development Community (SADC) states: 'Member States shall adopt policies and implement measures within the Community for the protection of IPRs, in accordance with WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.'

In March 2009, the East African Community (EAC) comprising Burundi, Kenya, Rwanda, Tanzania and Uganda commenced negotiations to establish a common position on IP matters in anticipation of a bilateral agreement with the EU. As is discussed below, the parties are expected to begin full implementation of the new IP regime no later than 1 January 2014. It has been observed that this appears to be an ambitious schedule, as the LDC members of the EAC have yet to meet TRIPS standards that are considered by to be less stringent than those contained in the draft EU-EAC IP text.

The partnership agreement between the members of the African, Caribbean and Pacific Group of states and the EU signed on 23 June 2000 (Cotonou Agreement) provides in Article 46 that 'the Parties recognise the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS including protection of geographical indications,

in line with the international standards with a view to reducing distortions and impediments to bilateral trade'. Pursuant to the Cotonou Agreement, a number of Economic Partnership Agreements (EPAs) have been entered into between the EU and a number of groups of ACP countries. The EPAs will succeed the trade provisions of the Cotonou Agreement and came into force in January 2008. In the draft proposals with ECOWAS (West Africa) and SADC, substantive obligations are proposed in the areas of: trademarks, geographical indications and enforcement. Côte d'Ivoire and Ghana have signed provisional EPAs.

National GI legislation in Africa

The legislation that protects GIs in the countries which are examined in the case studies in Chapters 7–18 is outlined below.

Ethiopia

The protection of intellectual property is recognized by the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE). Articles 51(19) and 77(6) expressly provide that the Federal Government protects patents and copyrights. In accordance with the spirit of the Constitution, the Government enacted IP laws and established institutions that administer the laws. However, there is no comprehensive legal framework yet. There are no laws that accord protection to some of the elements of intellectual property.⁸

The existing intellectual property legal framework includes general and specific laws. The general laws are the Civil, Commercial and Penal Codes that deal with civil and criminal remedies when IP rights are infringed. Ethiopia does not have a *sui generis* GIs law, but the protection of certification and collective marks is provided for in the Trademark Registration and Protection Proclamation, No 501/2006, which was issued in July 2006.

Ghana

The legal system is based on British common law, customary (traditional) law, and the 1992 constitution. In 2003, Ghana enacted the Geographical Indications Act. Papa Owusu-Ankomah, Minister of Justice and Attorney General, in his Second Reading Speech indicated that wrongful use of geographical indications was contrary to honest practices in industry and trade and was misleading to purchasers of the goods for which indications are used and that persons who wrongfully use the indications obtain an unfair advantage over their competitors.⁹ He added that geographical indications are applied to natural and agricultural products and the products of handicraft and industry, such as wood, sugar, fruits, wine, coffee, tea, tobacco, textile goods and woven goods. The Minister said that GIs do not only contribute to the reputation of a product but it creates goodwill among consumers and can assist in export promotion. In the debate that ensued,

Members of Parliament said that the development needs of marketing of produce were very important under the Bill and cited that Ghana's main crop, cocoa, needed to be protected and that the Bill required to be given a second look for the protection of local products. Cited for protection were Pito, palm wine and the Kente cloth as highly abused internationally and required to be protected under the Bill. Parliament expressed concern that products emanating from African and developing countries seem not to be covered by the TRIPS Agreement and cited Kente cloth and other initiatives that have not been included in the Agreement.

Ghana substantially revised and modernized its trademark law, by the enactment of the Trade Marks Act, 2004. The Act provides for the registration of certification marks. It introduced for the first time in Ghana the concept of infringement of similar goods. Also, the Act makes the practice of infringement a criminal offence, liable to criminal sanction. The provisions concerning Trade Descriptions and the application of forged or fraudulent marks were incorporated in the Trade Marks Act. The Act makes it an offence to apply what is termed a 'forged' trademark to any goods or services.

Provision was made for the registration of service marks. This development had been long awaited by owners of trademark rights and brought trademark law in Ghana in line with most other jurisdictions around the world. In addition, the new law specifically states that the classification of goods and services applicable in Ghana is the classification according to the Nice Agreement Concerning the International Classification of Goods and Services as last revised.

Kenya

Trademarks are administered by the Kenya Industrial Property Institute (KIPI). The Managing Director of KIPI administers the industrial property legislation of Kenya, including the Kenyan Trade Marks Act 2002 (TMA). Under the TMA, the Managing Director also functions as the Registrar of Trade Marks. The draft Geographical Indications Bill 2010 envisages that the Managing Director will also function as the Registrar of GIs. KIPI is an instrumentality of the Ministry of Industrialisation. The Ministries of Trade and Agriculture participate as stakeholders in the negotiations for a GIs law. The Ministry of Agriculture is playing a significant role in the development of certification marks and GIs for the Kenya Coffee and Tea Boards.

The TMA provides for the registration of distinctive trademarks and, like most trademark laws, provides that a mark lacks distinctiveness when it consists of a word or words being, according to its ordinary signification, a geographical name.¹⁰ This exclusion does not apply to certification marks or collective marks. Part VII of the TMA provides for the registration of Certification Marks. Section 40(1) specifies that a 'mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin shall be registrable as a certification trade mark in Part A of the register in respect of those goods in the name, as proprietor thereof, of that person' provided that a mark shall not be so registrable in the name of a person who carries on a trade in goods of the kind certified. Section 40(7) provides 'that there shall be deposited at the office of the Registrar in respect of every

trademark registered under section 47 regulations governing their use, which shall include provisions as to the cases in which the proprietor is to certify goods and to authorize the use of the trade mark’.

Part VIIA of the TMA provides for the registration of collective trademarks. Section 40A(5) of the TMA provides that ‘geographical names or other indications of geographical origin may be registered as collective trade marks or service marks’. Section 40A(1) of the TMA provides that a mark ‘capable of distinguishing, in the course of trade, the goods or services of persons who are members of an association, from goods or services of persons who are not members of such association, shall on application in the prescribed manner, be registrable as a collective trade mark or service mark in respect of the goods or services in the name of such an association’. Sub-section (2) provides that an application for registration of a collective trademark ‘shall be accompanied by a copy of the rules governing the use of the mark’.

The First Schedule to the TMA amplifies the provisions concerning the registration of certification trademarks. It provides that an application for the registration of a mark under section 40 shall be made to the Registrar in writing by the person proposed to be registered as the proprietor thereof. An applicant for the registration of a mark under section 40 shall transmit to the Registrar draft regulations for governing the use thereof in accordance with subsection 7 of that section. The Registrar is required to consider the application with regard to the following matters:

- (a) Whether the applicant is competent to certify the goods in respect of which the mark is to be registered;
- (b) Whether the draft regulations are satisfactory; and
- (c) Whether in all the circumstances the registration applied for would be to the public advantage.

The Registrar may either refuse to accept the application; or accept the application and approve the regulations either without modification and unconditionally or subject to any conditions or limitations, or to any amendments or modifications of the application or of the regulations, which he thinks requisite having regard to any of the foregoing matters. The balance of the schedule deals with advertising the application, opposition proceedings and procedures concerning the variation of the regulations of an applicant.

Kenya is in the process of drafting a Bill on GIs. Drafting commenced in 2001, with the process being initiated by the Kenya Industrial Property Institute (KIPI). Draft Instructions for a bill on the protection of GIs were prepared in 2001 by KIPI and forwarded to the Attorney General’s Office for consideration. Due to other commitments, the Attorney General’s Office made no progress on the Draft Instructions and in 2007 they were referred back to KIPI for further consultations with stakeholders in order to incorporate changes that might have been necessitated by the passage of time. In 2009, a ‘Bill for The Geographical Indications Regulations together with associated Drafting Instructions were published’ (Bocedi 2010) and the comments of KIPI were communicated to the Attorney General’s Department. These comments were considered by the Attorney General’s Department which, on 17 December

2010, issued the Geographical Indications Bill 2010. It is envisaged that, subject to any further comments by stakeholders, this will be presented as a Government Bill when the Parliamentary schedule is favourable.

Section 2 of the Bill defined 'geographical indication' as 'an indication which identifies a product as originating from a territory, or a region or locality where a given quality, reputation or other characteristics of the product are exclusively or essentially attributable to its geographical origin'. Under regulation 5(3)(b) of the Regulations accompanying the Bill, 'geographical origin' is described as a 'geographical environment and the natural or human factors'. Products are defined in section 2 as including 'natural, agricultural, food and handicrafts', which makes the GIs protection envisaged in the Bill wider than that provided in the EU regulations.

Although the Bill provides for the registration of GIs, section 5(1) provides that protection is available regardless of registration. However, section 5(2) provides that registration under the Act shall be sufficient proof that the indication is a geographical indication within the meaning of section 2. Section 8 includes among eligible applicants for GIs protection, associations of producers within the relevant geographical area. Section 9 sets out the particulars that have to be filed with applications. These include the depiction of the relevant geographical area and the quality, reputation or other characteristic that is attributable to its origin. Section 15 requires that reference should be made to 'registered geographical indication' in the labelling of products.

Section 33 of the Bill provides for the protection of the GIs of those countries with which Kenya has concluded an agreement.

Mauritius

In Mauritius, there has been industrial property legislation dating back to the 19th century and derived from the British common law tradition. The initial industrial property statutes were the Patents Act 1875 and the Trade Marks Act 1868. As a consequence of its membership of the World Trade Organization, Mauritius has been obliged to comply with the TRIPS Agreement, and the Patent, Industrial Designs and Trade Marks Act 2002 was enacted as an initial response. Further modification of Mauritius IP legislation has been proposed to comply with the TRIPS Agreement, to incorporate international agreements subsequent to TRIPS and for the purpose of advancing the economic and social development of the country. In April 2009, a WIPO Expert Mission visited Mauritius to advise the Government of the Mauritius to assess the current IP system, identify weaknesses, provide technical support and make concrete proposals with the view to defining specific needs-oriented activities and projects for implementation within a national Intellectual Property Development Plan (IPDP) in such a manner as to create, protect and make strategic use of IPRs and assets for economic growth and development. Its report, dated 26 May 2009, recommended the formulation of a national IP policy, the updating of its IP legislation and the centralization of its IP administration (Leesti and Mengistie 2009). A following EU technical assistance mission in August–September 2009 provided a draft national IP policy and draft industrial property and copyright laws (Blakeney and Mengistie 2009).

In an endeavour particularly to encourage the non-sugar agricultural sector, a Geographical Indications Act was drafted in 2002. This Act has not yet been adopted, largely because of the ongoing review of Mauritius' industrial property legislation. The Act in section 2 defines 'geographical indication' as 'an indication which identifies a product as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin'. Section 3(2) provides an act of unfair practice defined in section 3(1) may give rise to a claim in damages. Section 3(1)(a) provides that the use of 'any means in the designation or presentation of a product that indicates or suggests that the product in question originates in a geographical area, other than the true place of origin, in a manner which misleads the public as to the geographical origin of the product'. 'Product' is defined in section 2 as 'any natural or agricultural product or any product of handicraft or industry'.

Section 4(1) provides that the protection under the Act exists irrespective of whether it has been registered. However, Part II of the Act establishes a system of registration. Under section 8(2) an application may be filed with the Head of the IP Office by 'any person carrying on an activity as a producer in the geographical area specified in the application, with respect to the product specified in the application'. Section 9 provides that the application shall specify:

- (a) the name, address and nationality of the person filing the application, and the capacity in which the applicant is applying for registration;
- (b) the geographical indication for which registration is sought;
- (c) the geographical areas to which the geographical indication applies;
- (d) the products for which the geographical indication applies; and
- (e) the quality, reputation or other characteristic of the products for which the geographical indication is used.

Upon registration, section 11 provides that no person, other than a producer carrying on an activity in the geographical area specified in the Register, shall have the right to use a registered GI in the course of trade with respect to the products specified in the Register, and which possess the quality, reputation or other characteristics specified in the Register.

Other provisions of the Act deal with GIs in relation to wines and spirits, along similar lines to Article 23 of the TRIPS Agreement.

Provisions dealing with the registration of GIs were also included in the Industrial Property Law prepared for Mauritius in 2009. Section 239 of this Law prohibited the use of false or misleading GIs in similar terms to Article 22 of the TRIPS Agreement. Section 243 of the Law provided for the registration of GIs in similar terms to the Patents, Industrial Designs and Trademarks Act, 2002 ('the 2002 Act'). Section 249 of the Law provided for the conversion of GIs to trademarks.

The 2002 Act of Mauritius contains its regime for registered trademarks. Section 36(1) provides that the exclusive right to any mark shall be acquired by registration in accordance with the provisions of the Act. It makes no specific reference to the

non-registrability of geographic marks, but section 2(a) requires that for registration a mark shall be capable 'of distinguishing the goods or services of one enterprise from those of other enterprises', which in most circumstances would disqualify geographical marks. However, section 44 provides for the registration of collective marks. Section 35(a) defines 'collective mark' as 'any visible sign designated as such in the application for registration and capable of distinguishing the origin or any other common characteristic, including the quality of goods or services, of different enterprises which use the sign under the control of the registered owner of the collective mark'. The Act makes no provision for the registration of certification marks and in this absence and prior to the proclamation of any legislation concerned with registered GIs, the possibility of the registration of collective marks provides the only current possibility for the protection of GIs in Mauritius.

Section 44(2) of the Act provides that any application for registration of a collective mark shall designate the mark as a collective mark and be accompanied by a copy of the terms of the agreement governing the use of the collective mark. Section 44(4) provides for the invalidation of collective marks used in contravention of the terms of the agreement referred to in subsection (2) or where the use is 'in a manner liable to deceive any person as to the origin or any other common characteristics of the goods or services concerned'.

Part V of the draft Industrial Property Law 2009 provided for the registration of trademarks, collective marks and certification marks. Relevant to the protection of GIs, section 174(2) of the Law provided that a mark could not be validly registered if it was devoid of any distinctive character and if it consisted exclusively of 'signs or indications which may serve, in trade, to designate the kind ... geographical origin ... or other characteristics of goods'. Section 200 of the Law provided that the use by a person of a sign indicating the geographical origin of goods could not be regarded as an infringing act, provided the use was 'in accordance with honest practices in industrial or commercial matters'.

Division VII of the draft Industrial Property Law 2009 provided for the registration both of collective and certification marks. Section 217(1) defined a collective mark in much the same way as section 44 of the Patents, Industrial Designs and Trademarks Act 2002. An innovation in the 2009 Law was the inclusion of certification marks, defined in section 218(1) as: 'A sign used, or intended to be used, to distinguish goods or services: (a) dealt with or provided in the course of trade; and (b) certified by the proprietor of the certification mark in relation to origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from other goods or services dealt with or provided in the course of trade but not so certified.' Section 218(2) provides that the application for the registration of a certification mark must designate the sign as a certification mark and shall be accompanied by the rules governing its use. This provision lends itself to the protection of GIs, in the absence of *sui generis* legislation dealing with the subject.

Morocco

Morocco, which is the first of the countries studied to have registered a national GI, provides for the registration of GIs in Law 31/05 amending and supplementing Law 17/97 relating to the protection of industrial property adopted by Parliament on 14

December 2005. Morocco also provides for the registration of GIs for wines¹¹ and for fish of the Atlas coast.¹² To date, six products in Morocco have been approved for registration by the national commission for geographical indications and appellation of origin.¹³ Morocco is also considering a bilateral agreement with the EU which envisages GIs protection.

Rwanda

In Rwanda, the legislative framework for registration and protection of geographical indications consists of Law No 31/2009 of 26 October 2009 on Protection of Intellectual Property, and more specifically Articles 165–176, the former concerning the filing of geographical indication, including setting conditions that must be met to allow the protection of a geographical indication. These include recognition of a specific quality and of reputation of the product on the basis of this quality, or on the basis of any other characteristic. A Ministerial decree sets the cost of geographical indication registration by the Rwanda Development Board (RDB) at the amount of 50,000 FRW,¹⁴ the same cost as filing a trademark.

It is noteworthy that the applicant is responsible for developing the specifications relating to the geographical indication; these specifications are then subject to the approval of the Office of the Registrar General (ORG). Producer groups, however, may request assistance from the ORG in the development of these specifications and therefore the ORG, along with other institutions, could be associated with this phase.

According to the RDB, as geographical indication designates a product group, contrary to a patent or trademark which clearly belong to an individual producer, management by the public authority should be provisioned. In this context, the status of the applicant for a geographical indication is not limited by law and may well be an individual or a legal entity, public or private. The law does stipulate that a geographical indication must benefit ‘producers’; this could constitute a condition regarding the status of the applicant.

In Rwanda, Law No 31/2009 is the first to integrate the issue of protection of geographical indications and establishes a *sui generis* protection system. The Law was drafted with the support of experts from the World Intellectual Property Organization. Integration of geographical indications in the Law is part of the overall strategy for economic development of Rwanda, which focuses on the development of local production. An overall policy paper was prepared by the Ministry of Commerce prior to drafting the Law.

This legal framework was developed also with a view to meet Rwanda’s international obligations as a member of the World Trade Organization and, therefore, signatory to the TRIPS Agreement. The legal framework’s provisions on geographical indications are very similar to the relevant content of the TRIPS Agreement.

Application of the law on intellectual property protection is the responsibility of the Rwanda Development Board, an agency itself under the direct authority of the Presidency of the Republic, which has four departments: competent in matters of tourism and conservation of heritage; one for information technology; a department

responsible for human capital; and finally, an entity in charge of trade and crafts and promotion of investments. Within this latter department, the Office of the Registrar General (ORG) has jurisdiction over the registration and protection of geographical indications. The ORG is composed of three sectors in charge of company registration, registration of mortgages and intellectual property respectively.

It should be noted that under Law No 31/2009, management of the geographical indication is under the responsibility of the applicant. The ORG could offer arbitration of dispute concerning the implementation of a geographical indication but has no authority to intervene directly in its management. A specific agency should thus be created for this purpose.

Given the very recent entry into force of the Law, no product in Rwanda has been granted protection of its geographical indication to date, neither is any investigation underway for the protection of the indication geographic of a product.

It should be underlined that many coffees are already sold under names referencing a geographical origin; these names have been registered as trademarks prior to the adoption of the Law. This is the case of 'Maraba coffee' or 'Kivu coffee'. About a dozen trademarks would be affected. These trademarks are the property of private corporations, cooperatives or OCIR-Café. Filing a geographical indication under the same name could well conflict with the exercise of intellectual property rights attached to those trademarks which are also often protected on various export markets.¹⁵

Under Article 13 of Law No 31/2009, the RDB ensures promotion of protection of geographical indications in Rwanda. This promotion is based on an information campaign and awareness-raising targeting producers, and builds on the findings of an identification study undertaken by the Ministry of Commerce, to investigate products eligible for protection of geographical indication.

South Africa

South Africa has not enacted a general GIs statute but provides for the protection of GIs for wines under its Liquor Products Act No 60 of 1989, as amended by the Liquor Products Amendment Act No 11 of 1993. It is a signatory of Agreements with the European Community on trade in wine¹⁶ and on trade in spirits.¹⁷ Under these agreements South Africa accepted that the names 'port', 'sherry', 'grappa' and 'ouzo', as protected GIs in the countries of the EU, should also be accepted as such in South Africa and that their use by non-EU producers would be phased out of use in the South African local and export markets (see van der Merwe 2009). The Trade Marks Act No 194 of 22 December 1993, which entered into force on 1 May 1995, provides for the registration of geographical names or other indications of geographical origin, such as certification and collective trademarks. Section 6 of the Merchandise Marks Act of 1941 makes it an offence to apply a false trade description to goods. A trade description is defined in section 1 as including an indication as to place or country of manufacturing or production of goods. It includes any mark or the like that according to custom in trade is taken to serve as an indication of place of manufacturing or production of goods. The Counterfeit Goods Act 1997 prohibits

the use of a mark involving IPRs in relation to goods without the authority of the owner of the rights. The Agricultural Product Standards Act 1990 prohibits, in section 6, the use of a mark in connection with the sale of an agricultural product that conveys or creates a false or misleading impression as to the quality or place of production of such product. In implementation of Article 23 of the TRIPS Agreement, section 6A provides for the declaration of specific prohibitions in relation to geographical and other names, including any use in conjunction with words such as 'kind', 'type' or the like. In the case of alcoholic products, the Liquor Products Act 1989 prohibits the use of the name of any country or word or expression containing such name in relation to the sale of liquor products except for products originating from that specific country.

Tanzania

Both Tanganyika and Zanzibar, which comprise the United Republic of Tanzania, were British colonies with a common law legal system. Although these states united in 1964, they still maintain separate trademarks laws and registration systems. Consequently, protection sought in one part of the union will not extend to the other part. To obtain trademark protection throughout the union, protection must be sought in both Tanganyika and Zanzibar (by filing separate trademark applications).

In Tanganyika, trademarks were governed by the Trade and Services Marks Act (TSMA), enacted in 1986 but which only became operational in October 1994. The Tanganyika Merchandise Marks Act 1963, which was enacted to combat counterfeiting activities, did not become operational until 15 April 2005 due to the delay in the publication of the commencement notice in the official *Gazette*. This law was updated by amendments in the Written Laws (Miscellaneous Amendments) (No 2) Act 2007.

Section 16(1) of the TSMA provides for the registration of distinctive marks. Section 19 provides that a mark cannot be registered if it would be likely to deceive or cause confusion as to the geographical origin of a product. Section 34 of the TSMA provides that no registration of a trade or service mark shall interfere with the bona fide use by any person of his own name or of the name of the geographical location of his business. No provision is included in the TSMA for the registration of collective or certification marks. No provision is made in any legislation for the registration of GIs in mainland Tanzania.

In Zanzibar, before September 2008, trademarks were governed by the Trade Marks Decree 1930. In 2008, this was replaced by the Zanzibar Industrial Property Act 2008, which came into force from 13 September 2008. This law consolidates and codifies industrial property law with separate divisions on trade and service marks, including collective and certification marks and GIs, as well as the other categories of industrial property.

Under section 46(2) of the Zanzibar Industrial Property Act 2008 (Zanzibar Act) trademarks are registrable provided they are distinctive. Section 48(4)(c) provides that marks may be denied registration when, according to the customs of the trade, they are used to indicate the place of origin of the goods with which they are used.

Section 51 of the Zanzibar Act provides for the registration of collective marks and section 52 provides for the registration of certification marks.

Section 60 of the Zanzibar Act provides for the registration of GIs. 'Geographical indications' are defined in section 2 as 'an indication which identifies a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin'. 'Good' is defined in section 56(a) as 'any natural or agricultural product or any product of handicraft or industry'. Section 59 disqualifies from registration GIs which do not meet the statutory definition in section 2, or which are not or have ceased to be protected in their place of origin.

Under section 60, an application for registration may be filed with the Registrar by 'any person carrying on an activity as a producer in the geographical area specified in the application, with respect to the product specified in the application'. Section 61 provides that the application shall specify:

- (a) the name, address and nationality of the person filing the application, and the capacity in which the applicant is applying for registration;
- (b) the geographical indication for which registration is sought;
- (c) the geographical areas to which the geographical indication applies;
- (d) the products for which the geographical indication applies; and
- (e) the quality, reputation or other characteristic of the products for which the geographical indication is used.

Upon registration, section 63 provides that no person, other than a producer carrying on an activity in the geographical area specified in the Register, shall have the right to use a registered GI in the course of trade with respect to the products specified in the Register, and which possess the quality, reputation or other characteristics specified in the Register.

Section 57 permits any interested person or group of consumers or producers to bring action to prevent the misleading use of GIs.

No GIs have yet been registered in Zanzibar, as the 2008 Law including its GI provisions requires implementing regulations.

Uganda

Uganda has a law governing trademarks and a draft law for the protection of geographical indications. The 2010 Trademark Act provides for protection of trademarks and certification marks. Sections 4 and 9 of the trademark law determine what constitutes a trademark and a registrable trademark. Section 4 states: 'A sign or combination of signs, capable of distinguishing goods or services of one undertaking from those of other undertakings shall be capable of constituting a trademark.' Section 9 enumerates signs that could be registered as a trademark. These include an invented word or words; a word or words having no direct reference to the character or quality of the goods or services and not being according to its ordinary signification, a

geographical name or a surname, and any other distinctive mark or sign. It is worth noting that the phrase ‘ordinary signification’ may mean that geographical name, which merely signifies a place, cannot be registered as a trademark. A geographical name may, however, be protected as a trademark if it has a primary non-geographical meaning.

In addition to trademarks, the trademark law deals with certification marks, which may help to protect geographical origin of products and services. Section 13(1) states: ‘A mark adapted in relation to any goods to distinguish, in the course of trade, goods certified by a person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not certified shall be registrable as a certification mark in Part A or Part B of the register in respect of those goods in the name of that person as owner.’ Section 13(6) adds: ‘The fact that a mark consists of signs or indications which may serve, in trade, to designate the geographical origin of goods or services shall not preclude it from being registered as a certification trademark in Part A of the register in respect of those goods or services.’ These provisions will enable producers to protect a sign or mark that may designate the geographical origin of a product or a name of a geographical location as a certification mark. Application for protection of a certification mark shall be accompanied by draft regulations governing the use of the mark, which shall include provisions as to the cases in which the owner is to certify goods or services and to authorize the use of the mark. They may also contain other provisions that the registrar may require or permit to be inserted, including provisions conferring a right of appeal to the registrar against any refusal of the owner to certify goods or services or to authorize the use of the mark in accordance with the rules.

Uganda has had a draft Geographical Indications Bill since 2008. The draft law aims to provide for the regulation and registration of geographical indications, duration of protection of geographical indications and remedies for infringement or prohibited use of geographical indications and for related purposes. The Bill defines a geographical indication as ‘any indication, which identifies a good as originating in a particular country, region or locality where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin’.

Ugandan membership of the ARIPO Banjul Protocol on trademarks provides the opportunity of filing a single trademark application with the Ugandan Registration Service Bureau (URSB) and securing trademark protection in designated countries that are members of ARIPO’s Banjul Protocol.¹⁸

Other national systems for the protection of GIs

Europe

Introduction

The protection of geographical indications across the European Economic Area became an early feature of the European Commission’s agricultural policy. The

formation of the European Community enabled the Commission to make the international protection for geographical indications an integral part of the Common Market's rural policy. The aim of Council Regulation 2081/92 on the protection of geographical indications and designations for agricultural products and foodstuffs noted in its seventh recital that 'there is diversity in the national practices for implementing registered designations of origin and geographical indications; a Community approach should be envisaged; a framework of Community rules on protection will permit the development of geographical indications and designations of origin since, by providing a more uniform approach, such a framework will ensure fair competition between the producers of products bearing such indications and enhance the credibility of the products in the consumers' eyes'.

It has been suggested that, despite the strong position taken by the EU on GI protection, there is variation among the individual EU member states concerning their enthusiasm for this system of intellectual property protection (Kur and Cocks 1999). France, Italy and Spain are identified as the nations that were instrumental in establishing the EU's current GI regulatory scheme (Hughes 2006: 318). It has been suggested that the Northern European nations 'with weaker agricultural heritage such as Germany' have remained 'disinterested with, and even wary of, strong GI protection' (Kur and Cocks 1999: 1006). Whether or not this distinction can be drawn, it emphasizes from a food security perspective, the role that GIs protection might play in agricultural policy.

The first national legislation on geographical indications was the French Law of 6 May 1919 concerning Appellations d'Origine (Olszak 2001). This law defined the characteristics with which wines and spirits had to comply for the application of an appellation and provided for the delimitation of regions to which appellations attached. The Law of 30 July 1935 provided for a generalized system of Appellations d'Origine Contrôlée (AOC) under the supervision of a committee, which from 1947 became the Institut National des Appellations d'Origine (INAO). Until 1990, the INAO was responsible only for wines and spirits but, following European legislation concerned with the protection of geographical indications and designations for agricultural products and foodstuffs, the jurisdiction of the INAO was extended to these items.

Under the French legislation, the registration of an appellation is initiated by a local syndicate. This is examined by the INAO, which consults with the relevant regional committee and then the national committee concerned with the products in question. Following the receipt of expert reports, the committee will then decide on whether to approve the application. A delineation committee will determine the definition of the terroirs within the proposed AOC. This will be incorporated within a draft decree, which is submitted to the Minister for Agriculture for promulgation. The supervision of the decree is undertaken by the INAO.

European GIs regulations

Inspired by the French legislation, the EC promulgated a series of regulations binding on all member nations of the EU dealing with designations for wines¹⁹ and spirits,²⁰

foodstuffs and agricultural products²¹ and mineral waters.²² Some modification to these regulations occurred as a result of the WTO Dispute Panel determination on GIs.

The European regime provides for the protection of ‘designations of origin’ or ‘geographical indications’ and that have not become generic, in that they are descriptive in trade to designate a category of goods. To qualify as a Protected Designation of Origin (PDO) or Protected Geographical Indication (PGI), a product must comply with specifications for describing the ‘principal physical, chemical, microbiological or organoleptic characteristics’ of the product, and also describe the geographic area from which it originates that gives rise to the product’s unique qualities.²³ In the case of a product originating from an EU Member State, a party seeking to register a GI must file an application for registration with the relevant authorities in the member state. In the case of a product originating from a country that is not a member of the EU, the party seeking GI registration must file an application with the EU Commission, either directly or through the relevant authorities in the applicant’s country. In the case of applications originating in EU member states, the competent authorities in the appropriate member state conduct an initial examination of the application, following a second assessment by the European Commission.

Where a product originates from outside the EU, the European Commission is the examining authority.

Following these assessments, the PDO or PGI application together with the specifications are published in the *Official Journal of the European Union*. For a period of six months following the date of publication, persons with a legitimate interest may object to the application. Following successful registration, the regulation permits producers in the geographical region identified in the specification to identify their products as PDO or PGI.

Registration prohibits any exploitation of the registered indication, by persons or enterprises from outside the area. Prohibited is:

- any direct or indirect commercial use of a name registered in respect of products not covered by the registration insofar as those products are comparable to the products registered under that name or insofar as using the name exploits the reputation of the protected name;
- any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as style, type, method, as produced in, imitation or similar;
- any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- any other practice liable to mislead the public as to the true origin of the product.

This prohibits not only food products from outside the region from using the geographical name, but also denies use of the name to products within the region that do not meet the standards set forth in the application. Furthermore, the prohibition as to

'any misuse, imitation or evocation, even if the true origin of the product', prevents the use of PDOs and PGIs in conjunction with qualifiers such as 'style' or 'method'. EU member states may allow continued use of these qualifiers for a transitional period of five years, if the products had previously been marketed in such a manner for at least five years and the true origin of the product is clearly labelled. However, this exception may not lead to the marketing of products freely on the territory of a member state where such expressions are prohibited.

As a matter of general practice, infringement actions in relation to geographical indications concern either: (a) wrongful use of a PGI or a PDO, in which case an action will be brought by the entity responsible for preserving the integrity of the geographical indication; or (b) in relation to a misleading use of a geographical indication.

Once the PDO or PGI has been awarded, production is monitored and assessed against the Regulation and the specifications by certifying bodies inspecting production or distribution plants, taking samples, inspecting business records or requesting information. Codes of Practice are usually formulated by producer associations to ensure specifications are complied with.

According to Regulation 510/2006, a prior PDO or PGI application takes priority over a trademark for a product of the same type or use where registration of the trademark could lead to confusion or exploitation of the name's reputation. Therefore the trademark application must be refused or invalidated. However, if a trademark has been applied for, registered or established by use in good faith within the EU before the designation of origin or geographical indication is protected at national level or the application is submitted to the Commission, the mark can continue to be used. A GI cannot be registered if it would be likely to mislead the consumer where there is a pre-existing trademark of strong reputation and length of use of the trademark.

Food processing and packaging as part of a protected designation of origin

A number of ECJ cases have addressed food processing and packaging as part of a PDO under Regulation 2081/92.

Case C-47/90 concerned the PDO 'Rioja', a wine produced in the La Rioja region of Spain. By order of the Spanish Minister for Agriculture, Fisheries and Food of 3 April 1991²⁴ the rules applicable to that designation and the Rioja were approved. Article 32 of the Rioja Rules provided that wine protected by the denominación de origen calificada Rioja shall be bottled exclusively in the registered cellars authorized by the Governing Council, failing which the wine may not bear that designation and that wines protected by the denominación de origen calificada Rioja may be put into circulation and be despatched solely from registered cellars, in special bottles which do not detract from their quality or prestige and have been approved by the Governing Council. The bottles must be of glass and of a capacity authorized by the European Economic Community with the exception of one-litre bottles.

In Case C-47/90 *Delhaize v Promalvin*,²⁵ the Court, in response to a request from the Tribunal de Commerce (Commercial Court), Brussels, for a ruling on the

compatibility with Article 34 of the Treaty of national legislation such as Decree 157/88 and the Rioja Rules adopted under it, held that national provisions applicable to wine of designated origin that limited the quantity of wine that might be exported in bulk but otherwise permitted sales of wine in bulk within the region of production constituted measures having equivalent effect to a quantitative restriction on exports that were prohibited by Article 34 of the EC Treaty. The Spanish Government's argument that the supervisory powers vested in the Rioja Governing Council were limited to the region of production, making it necessary for the wine to be bottled in the region of production, was rejected by the Court on the ground that Regulation (EEC) No 986/89 had established a system for verifying that the authenticity of the wine was not affected during transport (paragraph 21). In 1994, the Belgian Government drew the Commission's attention to the fact that the Spanish rules at issue in *Delhaize* were still in force, despite the interpretation of Article 34 of the Treaty (now, after amendment, Article 29 EC) given by the Court in that judgment, and called on it to act. On 14 November 1994, the competent member of the Commission replied that the Commission considered it 'inappropriate' to persist with Treaty-infringement cases. The Belgian Government and the Danish, Netherlands, Finnish and United Kingdom Governments, intervening in its support, claim that, by not amending Decree No 157/88 in order to comply with the *Delhaize* judgment, the Kingdom of Spain has failed to fulfil its obligations under Article 5 of the, as interpreted by the Court of Justice of the European Communities in its judgment of 9 June 1992 and Article 5 of the EC Treaty (now Article 10 EC).

The Spanish, Italian and Portuguese Governments and the Commission adduced new information to demonstrate that the reasons underlying the contested requirement were capable of justifying it. They argued that, particularly in the wines sector, Community legislation displays a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through, *inter alia*, the use of designations of origin that enjoy special protection. In relation to Rioja wine, the Court accepted that its particular qualities and characteristics are a result of a combination of natural and human factors that are linked to its geographical area of origin and that vigilance must be exercised and efforts made in order for them to be maintained. It accepted that the rules governing the Rioja denominación de origen calificada were designed to uphold those qualities and characteristics. The control over bottling was accepted as being in pursuit of the aim of better safeguarding the quality of the product and, consequently, the reputation of the designation. The Spanish Government, supported by the Italian and Portuguese Governments and by the Commission, submits that, without this requirement, the reputation of the Rioja denominación de origen calificada might be undermined. Transport and bottling outside the region of production would, in its view, put the quality of the wine at risk.

The Court accepted that the bottling of wine is an important operation which, if not carried out in accordance with strict requirements, could seriously impair the quality of the product. Bottling does not involve merely filling empty containers but normally entails, before filling, a series of complex oenological operations (filtering,

clarifying, cooling, and so on) which, if not carried out in accordance with the prescribed rules of the trade, may adversely affect the quality and alter the characteristics of the wine. It was not contested that bulk transport of wine could seriously impair its quality if not undertaken under optimum conditions. Although the Court accepted that, in the best conditions, a wine's characteristics and quality may indeed be maintained when it has been transported in bulk and bottled outside the region of production, it observed that in the case of bottling, the best conditions are more certain to be assured if bottling is done by undertakings established in the region of those entitled to use the designation and operating under their direct control, since they have specialized experience and thorough knowledge of the specific characteristics of the wine in question, which must not be impaired or lost at the time of bottling.

The Court noted that, for Rioja wines transported and bottled in the region of production, the controls were far-reaching and systematic and were the responsibility of the totality of the producers themselves, who have a fundamental interest in preserving the reputation acquired. The Court also noted that it could be inferred that the risk to which the quality of the product is exposed was greater when it has been transported and bottled outside the region of production than when those operations had taken place within the region. Accordingly, it ruled that the requirement at issue, whose aim was to preserve the considerable reputation of Rioja wine by strengthening control over its particular characteristics and its quality, was justified as a measure protecting the *denominación de origen calificada*, which may be used by all the producers concerned and is of decisive importance to them.

Case C-469/00²⁶ concerned the PDO 'Grana Padano', which was registered for 'cheeses'. This registration was subject to the condition that the grating of the cheese be carried out in the region of production and packaging. The defendant imported, grated, pre-packaged and distributed 'Grana Padano' cheese in France, which it marketed under the designation 'Grana Padano râpé frais'. Two Italian cheese producers brought an action against the defendant in the Tribunal de commerce de Marseille seeking an injunction and damages. The Tribunal granted both applications and on appeal the Cour d'appel d'Aix-en-Provence upheld the judgment, stating that the acts of unfair competition were sufficiently made out by the marketing in France since 1992 of Grana Padano cheese in grated form. The Cour de cassation, to which the defendant appealed, sought a ruling from the ECJ as to whether Article 29 [EC] was to be interpreted as precluding national legislation reserving the Grana Padano designation of origin for cheese grated in the region of production, in so far as such an obligation is not indispensable for preserving the specific characteristics which the product has acquired.

Case C-108/01²⁷ concerned the Italian Legge No 26, tutela della denominazione di origine 'Prosciutto di Parma' (Law No 26 on protection of the designation of origin 'Prosciutto di Parma') of 13 February 1990, which reserved the designation 'Prosciutto di Parma' ('Parma ham') exclusively to ham marked with a distinguishing mark allowing it to be identified at any time, obtained from fresh legs of pigs raised and slaughtered in mainland Italy, produced in accordance with provisions laid down in the law. Article 25 of Decreto No 253, regolamento di esecuzione della legge 13

febbraio 1990, No 26 (Decree No 253 implementing Law No 26 of 13 February 1990) prescribed that the slicing and packaging of Parma ham must take place at plants in the typical production area which are approved by the Consorzio responsible for monitoring Parma ham production. 'Prosciutto di Parma' was registered as a PDO under Regulation No 1107/96, under the heading 'meat-based products'. The Consorzio was registered as an inspection body for the PDO under Article 10(2) of Regulation No 2081/92.

The case concerned the sale by Asda Stores Ltd, which operated a chain of supermarkets in the UK, of ham bearing the description 'Parma ham', purchased pre-sliced from Hygrade Foods Ltd, which itself purchases the ham boned but not sliced from an Italian producer who was a member of the Consorzio. The ham was sliced and hermetically sealed by Hygrade in packets bearing the wording 'ASDA/A taste of Italy/PARMA HAM/Genuine Italian Parma Ham'. The Consorzio brought proceedings by writ in the UK against Asda and Hygrade seeking various injunctions against them, essentially requiring them to cease their activities, on the ground that they were contrary to the rules applicable to Parma ham.

The House of Lords sought a ruling from the ECJ as to whether the Italian legislation read with Commission Regulation (EC) No 1107/96 and the specification for the PDO Prosciutto di Parma created a valid Community right, directly enforceable in the court of a member state, to restrain the retail sale as Parma ham of sliced and packaged ham derived from hams duly exported from Parma in compliance with the conditions of the PDO but which have not been thereafter sliced, packaged and labelled in accordance with the specification.

The Court, applying the 'Rioja' case, ruled that Regulation 2081/92 must be interpreted as not precluding the use of a PDO from being subject to the condition that operations such as the slicing and packaging of the product take place in the region of production, where such a condition was laid down in the specification. Although this was a measure having equivalent effect to a quantitative restriction on exports, the Court accepted that it was justified for the purpose of guaranteeing the authenticity and quality of the product, noting that Community legislation displayed a general tendency to enhance the quality of products within the framework of the common agricultural policy, in order to promote the reputation of those products through *inter alia* the use of designations of origin that enjoy special protection. Designations of origin, as industrial and commercial property rights, protected those entitled to use them against improper use of those designations by third parties seeking to profit from the reputation they have acquired. It ruled that the specification of the PDO 'Prosciutto di Parma', by requiring the slicing and packaging to be carried out in the region of production, was intended to allow the persons entitled to use the PDO to keep under their control one of the ways in which the product appears on the market. This condition was justified as safeguarding the quality and authenticity of the product, and consequently the reputation of the PDO, for those who are entitled to use it.

The Court noted that the slicing and packaging of Parma ham constituted important operations that may harm the quality and hence the reputation of the PDO if they

were carried out in conditions that result in a product not possessing the organoleptic qualities expected. Those operations may also compromise the guarantee of the product's authenticity, because they necessarily involve removal of the mark of origin of the whole hams used. Consequently, the Court ruled that the condition of slicing and packaging in the region of production, whose aim was to preserve the reputation of Parma ham by strengthening control over its particular characteristics and its quality, may be regarded as justified as a measure protecting the PDO, which may be used by all the operators concerned and is of decisive importance to them. The resulting restriction was therefore regarded as necessary for attaining the objective pursued, in that there were no alternative less restrictive measures capable of attaining it.

Finally, it concluded that the PDO 'Prosciutto di Parma' would not receive comparable protection from an obligation imposed on operators established outside the region of production to inform consumers, by means of appropriate labelling, that the slicing and packaging has taken place outside that region. Therefore, any deterioration in the quality or authenticity of ham sliced and packaged outside the region of production, resulting from materialization of the risks associated with slicing and packaging, might harm the reputation of all ham marketed under the PDO, including that sliced and packaged in the region of production under the control of the group of producers entitled to use the PDO.

Genericity

The EU Regulation prevents any protected name from becoming generic. Although a designation may be altered, or even lost as a result of changes in technology or processing techniques, it cannot be lost as a result of changes in understanding or usage of the protected name. Because of the general unfamiliarity of agricultural communities in developing countries with the concept of geographical indications, many of the products they produce will have become generic. This was arguably the case in Europe, for example, with the name 'Feta' for cheese. Greece had sought the registration of 'Feta' as a PDO for 'salted white cheese traditionally produced in Greece, from sheep's milk or a mixture of sheep's milk and goats' milk coming exclusively from the regions of Macedonia, Thrace, Epirus, Thessaly, Central Greece, Peloponnese and Lesbos'. Although a majority of the member states had asked the Commission to include the name 'Feta' on the list of generic names it was preparing, the Commission had taken the view that 'Feta' was not disqualified from registration on this ground. It had relied on a market survey conducted in Greece, which concluded that Feta was recognized as a geographical indication in that country. The ECJ ruled that it was not permissible for the Commission to minimize the importance to be attached to the situation existing in the member states other than the state of origin and that account must be taken of the existence of products that are legally on the market and have therefore been legally marketed under that name in member states other than the state of origin by which registration is applied for. Thus, as the Commission did not take due account of all the factors which Article 3(1) of

the basic regulation required it to take into consideration, the ECJ ruled that the contested regulation had to be annulled to the extent to which it registered the name 'Feta' as a PDO.

Under European law, food processing and packaging are considered to be part of a PDO and an infringement will occur if these activities are conducted outside the registered area. For example the grating and packaging of 'Grana Padano', in France, rather than the registered Italian agricultural region was an infringement.²⁸ Similarly, the sale by Asda of ham bearing the description 'Parma ham', purchased pre-sliced from a corporation outside activities, on the ground that they were contrary to the rules applicable to the registered PDO 'Prosciutto di Parma'.²⁹

India

India protects GIs under the Geographical Indications of Goods (Registration and Protection) Act 1999, which introduces a registration system. An application for registration of a geographical indication can be made by an association of persons or producers or any organization or authority, representing the interests of the producers of the concerned goods. GIs are defined in similar terms to the TRIPS Agreement. A producer of the goods in respect of which a GI has been registered may apply to the Registrar for registration as an authorized user of the GI. The Registrar will determine whether such person is a producer of relevant goods and register him as an authorized user.

The Indian GIs system was introduced to protect Darjeeling tea and the Tea Board of India has applied for the registration of the words 'Darjeeling' and 'Darjeeling logo' under the Act (see Srivastava nd). The Tea Board of India was established under the Tea Act 1963. It monitors cultivation, processing, promotion and sale of Darjeeling tea and certifies the origin of exports.

Thailand

Thailand enacted a *sui generis* GI law: Act on Protection of Geographical Indications BE 2546 on 28 April 2003. GI is defined in section 3(1) as 'name, symbol or any other thing which is used for calling or representing a geographical origin and can identify the goods originating from such geographical origin where the quality, reputation or other characteristic of the goods is attributable to the geographical origin'. The first GIs registered under the Thai law are: Pomelo from Nakorn Chaisri, Tamarind from Petchaboon and Hom Mali rice from Surin.

The Thai enactment of GI protection supplements its One Tambon,³⁰ One Product (OTOP) programme. This programme seeks to promote locally made and marketed products for each Tambon. The standards of the products will be approved by the Thai Industrial Standards Institute to ensure that the quality of the community products would be widely accepted. Typically, OTOP products are fabrics and textile products, artistic creations, processed food, fruits and drinks, utensils, wickerwork and fermented spirits (Tanasanti 2007).

Trinidad and Tobago

The Geographical Indications Act No 20 of 1996, as amended by Act No 18 of 2000, adopted by Trinidad and Tobago, is substantially based on the draft model law prepared by WIPO. It uses a TRIPS-style definition of GI, interested parties may prevent the use of indications in a manner which would mislead the public or that would be contrary to honest business practices within the meaning of Article 10*bis* of the Paris Convention.

Following registration, only producers carrying on their activity in the geographical area specified in the Register shall have the right to use a registered GI in the course of trade, with respect to the products specified in the Register, 'provided that such products possess the quality, reputation or other characteristic specified in the Register'.³¹

Trademark laws

UK

Protection against the wrongful appropriation of geographic indications is found in the English tort of passing-off. An application of passing off principles to GIs occurred in a case where the House of Lords had to consider whether an English alcoholic drinks manufacturer should be enjoined from using the name 'Advocaat' to describe his product, as this drink was typically associated with a traditional recipe of eggs and brandy, developed by Dutch manufacturers. In this case, the English manufacturer was accused of passing off.³² The elements of the tort were identified by Lord Diplock as involving a misrepresentation made by a trader in the course of trade to prospective or ultimate consumers of goods or services supplied by him that is calculated to injure the business or goodwill of another trader, which causes actual or probable damage to the plaintiff.

The principal development of passing off law in relation to geographical indications occurred with the Spanish Champagne case;³³ which formed the basis of protection for Champagne not only in England but also other common law jurisdictions. The question the court had to consider in that case was whether use of the term 'Spanish Champagne' could be used in relation to a sparkling wine not produced in the French Champagne district. The suit was instituted by one of the French Champagne houses on behalf of themselves and all other persons who produce wine in the Champagne district and supply such wine to England and Wales. The plaintiffs alleged that wine produced by the Champagne houses and supplied by them to England and Wales was a naturally sparkling wine produced in the Champagne district by a process of double fermentation from the grapes grown in the Champagne district and that it was long known to the trade and public throughout the UK as Champagne and has as such acquired a high reputation. They alleged that any member of the trade or public in the UK ordering Champagne or seeing wine advertised or offered for sale as Champagne, would expect the wine to be a naturally sparkling wine produced in the Champagne district from grapes grown there and no other.

The trial judge observed:

The region in which the Champagne vineyards are found is about a 100 miles east of Paris around Rheims and Epernay, where there is a chalky, flinty soil and the climate is subject to extreme variations of heat and cold. It appears that these factors give to the wine its particular qualities. Since 1927 the Champagne Viticole District has been strictly limited by law, and only certain vineyards are allowed in France to use the name 'Champagne'. Wines produced from these vineyards are sold as 'Champagne', but goodwill has also become attached to the names of the shippers, or 'brand names' as they are called. The wine is a naturally sparkling wine made from the grapes produced in the Champagne district by a process of double fermentation which requires a considerable amount of care.

He ruled that it was established that 'Champagne' in England meant the product produced in the Champagne district of France by the plaintiffs and the other growers and shippers in that district.

This decision was followed in the 'Sherry case'³⁴ in which Spanish Sherry producers claimed exclusive rights in the mark 'sherry' which they derived from the Jerez district of Spain. They sought to enjoin the use of the mark, 'British Sherry'. The court found that the term 'sherry' was indeed a geographical indication, but that the plaintiffs were disqualified from a remedy because they had acquiesced for a long time in the use in the English market of marks such as 'Australian Sherry' and 'South African Sherry'.

The Scotch whisky case³⁵ was the third in the line of English cases on protecting geographical indications. The questionable practice was the export of Scotch whisky to Ecuador where it was to be resold under the labels 'White Abbey' and 'Scottish Archer' Scotch whisky after being admixed with local cane spirit. The evidence in the case disclosed that there were two basic types of Scotch whisky: that made from malted barley only, and grain whisky, which is made from malted barley together with unmalted barley in varying proportions. These whiskies were produced by two different processes: the pot-still process for malt whisky and the patent or Coffey still process for grain whisky. Almost all of the whisky sold to the public is blended whisky, where a number of malt whiskies are blended with a number of grain whiskies to produce the whisky sold to the public under brand names. The formula for each brand is secret. There was evidence that there were no blenders of Scotch whisky outside of Scotland and England. The court held that as producers of Scotch whisky fell within the principle enunciated in the Spanish Champagne case and were entitled to have upheld the description of their product as 'Scotch whisky.'

Similar results were obtained by the Scotch whisky manufacturers in passing off cases in South Africa. In *William Grant v Cape Wine & Distillers*,³⁶ The court held that a blend of Scotch whisky with local spirit, together with advertising material showing a Scotsman in full Highland dress and carrying the slogan 'ten years in Scotland makes all the difference', was actionable. In *Long John International v Stellenbosch Wine Trust*,³⁷ the court enjoined the sale of a product called 'Ben Nevis Scotch Whisky Liquor'

with a Scottish theme to the label. The drink actually consisted of whisky distilled with water and sweetened with sugar.

In *Taittinger v Allbev*,³⁸ the Court of Appeal was concerned with the use of the name 'Elderflower Champagne' for the use of a soft drink. Despite the unlikelihood of English consumers thinking that the Champagne houses of France were now involved in the production of soft drinks, the Court took the view that the international significance of appellations of origin prevented their misuse, even in an apparently innocuous context.

United States

The US protects GIs within the scope of its trademarks law. This is done mainly through certification marks established under the Lanham Trademark Act of 1949. A certification mark is a 'word, name, symbol or device' that conforms to specifications laid down by the owner. The specifications may concern place of origin and/or methods of production.

In addition, GIs can be protected under US law as collective marks. A collective trademark can be granted to the members of a 'collective' for use by its members. The following certification trademarks have been registered in the US: 'Napa Valley Reserve' and 'Ohio river valley' for wines, 'Idaho' for potatoes and 'Vidalia' for onions, 'Real California Cheese' for cheese and 'Washington' for apples and 'Pride of New York' for various agricultural products (Beresford 1999). The leading US case involving the enforcement of a geographical indication as a certification mark is *Community of Roquefort v William Faehndrich, Inc.*³⁹ This case held that the designation 'Roquefort' was not a generic designation of blue cheese and that the owner of the certification mark was entitled to prevent the use of the mark on all cheeses not made in the French city of that name.

Despite the negotiating position which the US has taken in the WTO on GIs, similarly with the EU, the US has incorporated GI protection in its bilateral free trade agreements (FTAs) seeking protection for 'Tennessee Whiskey' and 'Bourbon' and GI protection is also included in the NAFTA. In the latest FTAs, the GI sections provide for a dual GIs/trademarks system of protection, for example, FTAs with Chile and Morocco.

People's Republic of China

China protects GIs under a law concerning Measures for the Registration and Administration of Collective Marks and Certification Marks. On 16 May 2005, Provisions for the Protection of Products of Geographical Indication were promulgated by the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), which is responsible for the administration of GIs in China. Regulations for the administration of the law came into force on 1 February 2008.

On 31 August 2008, China and the EU entered into an agreement for the reciprocal recognition of selected GIs. Ten Chinese products Dongshan White Asparagus, Guanxi Honey Pomelo, Jinxiang Garlic, Lixian Yam, Longjing Tea, Longkou Vermicelli,

Shaan'xi Apple, Zhenjiang Vinegar, Pinggu Big Peach and Yancheng Crayfish were agreed to be recognized in the EU. Ten EU products to be registered in China are: West Country farm cheddar, White stilton cheese/blue stilton cheese, Scottish farmed salmon, Prosciutto di Parma, Grana Padano, Pruneau d'Agen/Pruneaux d'Agen mi-cuits, Roquefort, Comté, Sierra Mágina and Priego de Córdoba.

Notes

- 1 Law No. 17-97 concerning Protection of Industrial Property No. 1-00-91 of 15 February 2000, which entered into force on 18 December 2004, modified on 14 December 2005 by Law 31-05 published on 20 February 2006. GIs are covered by Title 6 of the Law.
- 2 Article 32.
- 3 Antigua and Barbuda, The Commonwealth of the Bahamas, Barbados, Belize, The Commonwealth of Dominica, The Dominican Republic, Grenada, The Republic of Guyana, The Republic of Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, The Republic of Suriname, The Republic of Trinidad and Tobago.
- 4 *Official Journal of the European Union*, L289/I/4, 30 October 2008.
- 5 This Agreement replaces the Agreement between Australia and the European Community on Trade in Wine, which came into force on 1 March 1994.
- 6 Agreement between the European Community and the Republic of South Africa on Trade in Wine, signed on 28 January 2002; Council Decision of 21 January 2002 on the conclusion of an Agreement between the European Community and the Republic of South Africa on Trade in Wine, OJ L 28, 30 January 2002: 3.
- 7 Council Decision of 21 January 2002 on the conclusion of an agreement between the European Community and the Republic of South Africa on trade in spirits, 2002/51/EC, OJ L 28, 30 January 2002: 112.
- 8 There are no laws, for example, dealing with the protection of geographical indications, trade secrets, topography and lay-out designs as required by the TRIPS Agreement.
- 9 *The Hansard*, 26 November 2003.
- 10 TMA Article 12(1)(d).
- 11 Geographical Indications (No 1955-98, Wines Production), Order, 8 October 1998.
- 12 Order No 1957-98 of the Minister for Agriculture, Rural Development and Sea Fisheries Concerning the Registered Appellation of Origin Les coteaux de l'Atlas, 8 October 1998.
- 13 Geographical Indication 'Argane', Decree No 2816.09, 20 November 2009; Origin Appellation for the Olive oil 'Tyout Chiadma', Ministry of Agriculture Decree No 2817.09, 20 November 2009; Geographical Indication 'Clémentine de Berkane', Ministry of Agriculture decree No 1357-10, 30 April 2010; Geographical Indication 'Dattes majhoul de Tafilalet', Ministry of Agriculture Decree, 30 April 2010; Origin Appellation for 'Safran de Taliouine', Ministry of Agriculture Decree, 30 April 2010; Agricultural Label 'Agneau Laiton', Ministry of Agriculture Decree, 30 April 2010.
- 14 Approximately €65.
- 15 However, there is a legal possibility of cancelling a trademark, including on export markets, but this is a lengthy and costly process. Note that the collective marks, in turn, were first introduced by Law No 31/2009 and no collective mark has been filed to date in Rwanda.
- 16 OJ L 28, 30 January 2002: 4.
- 17 *Ibid.*: 113.
- 18 Botswana, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zimbabwe.
- 19 Commission Regulation 753/2002, articles 28-33, 2002 OJ (L118) 1, 14-18 (EC); Council Regulation 1493/1999, 'On the Organisation of the Market in Wine', articles 50-53, 1999 OJ (L179) 1, 27-29 (EC).

- 20 Council Regulation 1576/89, 'Laying Down General Rules on the Definition, Description, and Presentation of Spirit Drinks', 1989 OJ (L160) 1 (EC).
- 21 Council Regulation 2081/92, 'On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs', 1992 OJ (L208)1 (EC), superseded by Council Regulation 10/2006, 'On the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs', 2006 OJ (L93) 12 (EC).
- 22 Council Directive 80/777, 1980 OJ (L229)1 (EC), amended by Council Directive 96/70, 1996 OJ (L299) 26 (EC).
- 23 Council Regulation 510/2006, article 4, 2006 OJ (L93) 15.
- 24 BOE No 85, 9 April 1991: 10675.
- 25 [1992]ECR I-3669.
- 26 20 May 2003.
- 27 Case C-388/95 *Belgium v Spain* [2000]ECR I-3123.
- 28 Case C-469/00.
- 29 Case C-108/01.
- 30 A Tambon is an administrative division in Thailand.
- 31 Geographical Indications Act No 20 of 1996, Article 11.
- 32 *Erven Warnink B. V v J. Townend & Sons (Hull) Ltd* (1980), Reports of Patent Cases: 31.
- 33 *Bollinger (J) v Costa Brava Wine Company Ltd* (1959), All England Reports: 800.
- 34 *Vine Products Limited & Others v Mackenzie & Company Limited & Others* (1969), Reports of Patent Cases: 1.
- 35 *John Walker & Sons Ltd. v Henry Ost & Company Ltd* (1970) vol 2, All England Reports: 106.
- 36 1990, vol 3, South African Reports: 897.
- 37 1990, vol 4, South African Reports: 136.
- 38 1994, vol 4, All England Reports: 75.
- 39 303 F. 2d 494 (CA 2 1962).

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GEOGRAPHICAL INDICATIONS AND ECONOMIC DEVELOPMENT

Michael Blakeney and Getachew Mengistie

Development

Article 7 of the TRIPS Agreement states that the protection and enforcement of intellectual property rights ‘should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’. This provision has no operative effect, but there has been significant agitation, particularly by NGOs to ‘operationalize’ this provision and impose positive obligations particularly upon industrialized countries at least to promote the transfer of technology to developing countries. In summary, Article 7 envisages that IPRs should contribute towards economic development. This in turn raises two threshold questions: (i) what is meant by economic development; and (ii) can IPR protection make a contribution to economic development?

The 1987 Brundtland Report of the World Commission on Environment and Development pioneered the use in an international law context of ‘sustainable development’, which it defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’ (UN 1987). The Marrakesh Agreement Establishing the World Trade Organization recognizes the objective of sustainable development in its preamble. The Johannesburg Declaration on Sustainable Development, which was formulated at the 2002 World Summit on Sustainable Development, asserted the ‘collective responsibility’ of states ‘to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development, economic development, social development and environmental protection at the local, national and global levels’ (Johannesburg Declaration 2002). A similar approach was taken in the Declaration of Principles of International Law Related to Sustainable Development, which was adopted by the International

Law Association in 2002 (Segger and Khalfan 2004). For the purposes of our analysis, sustainable development can be conceived of as the movement of a country 'towards a situation where all its citizens enjoy a free and healthy life in a safe environment' (Annan 2000).

IPRs and economic development

The next question for us to consider is whether IPRs can contribute towards the process of development. The philosophy of IPR protection is to provide a limited period of commercial exclusivity, during which research and development costs are recovered as an incentive for innovation. The creation of WIPO as a specialized agency of the United Nations was, in part, predicated on the assumption that there was a significant causal relationship between intellectual property, technology transfer and development. It declares itself to be 'dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest'.¹ The United Nations Conference on Trade and Development (UNCTAD), which became representative of the views of developing countries on the role of IP in economic development, produced a number of studies calling for the improvement of the ways in which patent and trademarks laws operated in technology transfer transactions (for example, UNCTAD 1975, 1981). The assumption of these studies was that, with the removal of impediments and abuses in the operation of intellectual property laws, the resultant flow of technology would lead inexorably on to economic development.

However, a number of studies suggest that the evidence that IPRs are an inevitable precipitant of economic development is equivocal (see Blakeney and Mengistie 2011a). The UK Commission on Intellectual Property Rights report *Integrating Intellectual Property Rights and Development Policy* noted the complexity of evaluating the available evidence on the impact of intellectual property rights regimes on developing, or developed countries (CIPR 2002). It accepted in common with most studies the proposition that a prerequisite for sustainable development in any country is the development of an indigenous scientific and technological capacity and that, in principle, intellectual property rights can contribute to promoting effective national systems of innovation. A crude measure of the impact of intellectual property systems is the extent of use by nationals. On this basis, the CIPR concluded that 'in most low income countries, with a weak scientific and technological infrastructure, IP protection at the levels mandated by TRIPS is not a significant determinant of growth', whereas in technologically advanced developing countries, 'there is some evidence that IP protection becomes important when a country is well into the category of upper middle income developing countries' (CIPR 2002: 22). Maskus (2009: 500) similarly concludes that the evidence linking IPRs to economic development is complex, difficult to measure, lacks definitive results and is open to various interpretations, but that the limited evidence suggests that stronger IPRs promote economic growth and development as part of a coherent and broad set of complementary, trade,

competition and other economic policies. For African countries contemplating the protection of GIs, the strictures of Penrose on inappropriate patent protection continue to have currency. She famously warned that:

Any country must lose if it grants monopoly privileges in the domestic market which neither improve nor cheapen the goods available, develop its own productive capacity nor obtain for its producers at least equivalent privileges in other markets. No amount of talk about the 'economic unity of the world' can hide the fact that some countries with little export trade in industrial goods and few, if any, inventions for sale have nothing to gain from granting patents on inventions worked and patented abroad except the avoidance of unpleasant foreign retaliation in other directions. In this category are agricultural countries and countries striving to industrialise but exporting primarily raw materials ... whatever advantages may exist for these countries ... they do not include advantages related to their own economic gain from granting or obtaining patents on invention.

(Penrose 1951: 116–17)

However, for African countries wishing to take advantage of the trading opportunities that WTO membership offers, compliance with the minimum standards of IPR protection mandated by TRIPS is an unavoidable obligation. However, as was noted in Chapter 1, the GIs provisions of the TRIPS Agreement are sufficiently flexible to allow countries to implement a *sui generis*, as well as a trademarks-based system for the protection of origin products.

The WIPO development agenda

One of the political consequences of the TRIPS Agreement has been to raise the profile of the role of IP as an agent of globalization. Prior to TRIPS, WIPO was viewed in the main as a technical UN body responsible for the formulation of international agreements for the protection of IP and their administration; the harmonization of national IP legislation as well as for the administration of systems for the registration in multiple countries of patents, trademarks and industrial designs (see May 2007). One response of WIPO to the emergence of the TRIPS Agreement as the key international IP treaty was to try and demonstrate its continuing relevance as an IP norm-creating body. In 1996, it successfully organized a diplomatic conference that concluded the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. However, in 2000 it ran into difficulties in the negotiations of a Patent Law Treaty (PLT) when a group of developing countries sought to require the identification of source countries in applications for the patenting of biological material. The PLT was saved by the agreement of WIPO to shift this question for consideration in the context of a Substantive Patent Law Treaty (SPLT). The contentiousness of the recognition of source country rights, as well as difficulties with other substantive patent law principles in the context of WIPO's consensus

voting system, raises very considerable doubts about the likely success of the SPLT. As was mentioned above, the response of developed countries to this kind of impasse has been to shift IP norm creation to bilateral treaty negotiation.

The response of developing countries has been to look to an appropriately mandated WIPO to represent their interests. Until the TRIPS Agreement, IP was regarded as a technical matter and WIPO was regarded as a technical agency. The development implications of IP were highlighted in the WTO Ministerial at Doha in November 2001, where a number of IP issues were identified as matters to be included within the Doha Development Agenda. The divergence of views between developed and developing countries in the WTO's Council for TRIPS has prevented any significant progress on these matters. The role of IP as a development issue and the negotiating difficulties within the WTO has caused developing countries to re-examine closely the role WIPO might play in the development process.

From 2004, the 'Group of Friends of Development' led by Argentina and Brazil with Bolivia, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela argued that that WIPO, as a specialized agency of the United Nations, should integrate the development dimension into all its activities and be guided in particular by the UN Millennium Development Goals. This culminated in the Geneva Declaration on the Future of WIPO, which was drafted in October 2004 by activists gathered for the WIPO General Assembly. The Declaration identified a global crisis for humanity 'in the governance of knowledge, technology and culture'. It identified key areas where developing countries and LDCs were poorly served. Following the release of the Geneva Declaration, the WIPO General Assembly adopted a proposal put forward by Argentina and Brazil for the establishment of a Development Agenda for WIPO. In September 2007, the General Assembly of WIPO adopted a Development Agenda comprising 45 Recommendations in six clusters (WIPO 2004). Within these clusters the following matters, identified for immediate implementation, are of greatest relevance for the establishment of GIs in developing countries and LDCs:

CLUSTER A: Technical Assistance and Capacity Building. Item 4: Place particular emphasis on the needs of small and medium-sized enterprises (SMEs) and institutions dealing with scientific research and cultural industries and assist member states, at their request, in setting up appropriate national strategies in the field of intellectual property. Item 11: This cluster envisages that WIPO will assist member states to strengthen national capacity for protection of domestic creations, innovations and inventions, and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

CLUSTER B: Norm-setting, flexibilities, public policy and public domain. Item 23: This cluster concerns the promotion of 'pro-competitive intellectual property licensing practices, particularly with a view to fostering creativity, innovation and the transfer and dissemination of technology to interested countries, in particular developing countries and LDCs'. Obviously, this could embrace the development of GIs.

Clusters D and E deal with the evaluation of IP impacts and the review of WIPO technical assistance activities in the area of cooperation and development. These would enable the evaluation of the contribution that GIs could make to dealing with the promotion of origin products.

Capacity building activities under WIPO's Development Agenda provide a possibility for defraying some of the implementation costs of TRIPS. Pursuant to Recommendation 37 of the Development Agenda, WIPO's Committee on Development and Intellectual Property has initiated a 'Project on Intellectual Property and Socio-Economic Development' to conduct studies on the protection of intellectual property, to identify the possible links and impacts between IP and development.² Among the projects that have been initiated are 'Needs Evaluation and Technical Support for the Development of a Sectoral IP Development Strategy' to enhance the competitiveness of the cotton and clove sectors in Uganda and Zanzibar (discussed in Chapters 15 and 18). The committee also approved a project on 'Intellectual Property and Product Branding for Business Development in Developing Countries and Least-Developed Countries (LDCs)' in 2010. Currently three countries Panama, Thailand and Uganda are selected as beneficiaries of the project. Under this project, an intellectual property and branding strategy will be developed to protect and brand the geographical origin of selected products. In Uganda, for example, cotton, sesame and vanilla are selected and efforts are being made to develop intellectual and branding strategy for each of the products aiming at strengthening competitiveness of actors in the supply chain and enhance trade revenue.

The 2010 WIPO General Assembly took the decision 'to instruct the relevant WIPO Bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendations'. At the 19th session of the IGC, the Delegation of South Africa, on behalf of the African Group, commended the IGC for undertaking text-based negotiations with the objective of concluding an appropriate international legal instrument or instruments for the protection of TK, TCEs and genetic resources.³

Negative externalities

A very considerable investment of scarce resources in developing countries is taken up with the administrative infrastructure of intellectual property. Fully equipped patents, designs and trademarks offices have been established in countries that also have significant requirements for the construction of schools and hospitals. Scarce engineers and lawyers are employed as examiners or administrators in those offices. Resources have to be devoted to their training. The registration statistics indicate that this infrastructure is largely devoted to the registration of overwhelmingly foreign-owned intellectual property rights. The CIPR stated that it was very difficult to draw general conclusions about the scale of these intellectual property infrastructure costs in developing countries, primarily because of different volumes of intellectual property applications required to be processed and the variances in local labour and accommodation costs. A 1996 study by UNCTAD reported some estimates of the

institutional costs of compliance with TRIPS in developing countries (UNCTAD 1996). Thus in Chile, additional fixed costs to upgrade the IP infrastructure were estimated at \$718,000, with annual recurrent costs increasing to \$837,000. In Egypt, the fixed costs were estimated at \$800,000 with additional annual training costs of around \$1 million. Bangladesh anticipated one-time costs of only \$250,000 (drafting legislation) and \$1.1 million in annual costs for judicial work, equipment and enforcement costs, exclusive of training.

Technology transfer

Chapter 2 outlined some of the requirements in setting up a GIs system. There is obviously considerable expertise among European producers who sell origin products, which could be shared with African producers. Article 66.2 of TRIPS provides that developed country members 'shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base'. The success of Article 66.2 in promoting technology transfer to LDCs has been questioned (Moon 2008). Some of the difficulties in implementing Article 66.2 were outlined by the EU in its 2007 report to the TRIPS Council. It noted that the efforts of EU member states to encourage and promote technology transfer were constrained by the fact that the vast majority of technologies were in private hands and that it could not compel the transfer of these technologies and that government incentives are only one of many factors relevant to owners' decisions regarding where to direct FDI and technology transfer.⁴

A number of African commentators have been critical of technology transfer and patent licensing as a means of accelerating their economic development process. It is noted that the decision concerning which technology to transfer, invariably being made by a foreign investor, could involve the transfer of technology which is inappropriate for the host country. For example a 1995 study of science and technology policy in four sub-Saharan countries (Ghana, Kenya, Tanzania and Uganda) indicated that the areas of science and technology most vigorously pursued in these countries were dictated by foreign investors, thus, for example, Tanzania's Agricultural Master Plan assigned priorities to export-oriented commodities facing deteriorating terms of trade, such as coffee, tea and rice, rather than to domestic priorities (Enos 1995). This study illustrates a proposition that is also relevant to the formulation of IP policies by African countries, that investment or donor assistance will usually be conditioned by the policy priorities of the investing and donor countries (see also Tabaro 2009).

In relation to GIs, the EU has commissioned a number of projects that have formed the basis for GIs capacity building in Africa. From 1996 to 1999, a project 'PDO-PGI Markets, Supply Chains and Institutions' explored products covered by the European Protected Designations of Origin (PDO), and Protected Geographical Indications (see the papers in Sylvander et al. 1999). Following on from this project, a group of agricultural economists connected with the French Society for Rural

Economy⁵ undertook a project from 2000 to 2004, the Development of Origin Labelled Products, Innovation and Sustainability (DOLPHINS) which looked at the organization and management of supply chains for GIs.⁶ The researchers involved in the DOLPHINS project subsequently collaborated in another EU-funded project, Strengthening of International Network Research on GIs (SINER-GI) 2005–2008, which sought to examine the global impacts of GIs and particularly their impact in developing countries. Following on from this research, a number of EU-funded projects are underway in Africa to build institutional competence to underpin GIs protection for Oku white honey and Penja white pepper from Cameroon, onions from Dogon, Mali, and Attiéké and Korhogo cloth from Côte d'Ivoire through a cooperation agreement between the French National IP Institute and OAPI.

National technological capacity

A prerequisite for sustainable economic development is the development of an indigenous scientific and technological capacity. A number of studies have noted the important contribution of IPRs in contributing to the promotion of effective national systems of innovation (see Blakeney and Mengistie 2011a: 239–40). The need to accelerate the pace and scope of IP asset creation generally and commercialization in relation to GIs specifically can be supported through the promotion of greater public awareness of the role of IP in asset creation and the building up of human resources and institutions relating to the commercialization of IP. A key aspect is developing the capacity of national IP offices and other institutions to provide business development services to assist entrepreneurs and firms in selecting appropriate technologies at reasonable costs and to widen and deepen technological capacities through the integration of IP issues in business strategies and plans.

Regional collaboration on IP was proposed by the Extraordinary Conference of the African Union (AU) Ministers of Council on Science and Technology (Amcost) in November 2006 in Cairo. A concept paper was put forward for the establishment of a Pan-African Organization on Intellectual Property (PAIPO). The rationale for creating an Africa-wide IP institution was explained as coming from 'the realization that Africa needs a mechanism to facilitate far-reaching changes in the arena of intellectual property ... and that such revolutionary reforms cannot be effected through exiting regional arrangements that are currently underpinned by geographical limitations and lack of continental inclusiveness' (AU 2006). The establishment of an Africa-wide IP structure was seen as useful in sharpening 'the visibility of IP issues as they relate to economic development' (AU 2006).

Since its proposal, there has been no obvious progress on establishing the PAIPO. Part of the reason for this is the continuing roles, if any, for ARIPO and OAPI. The two organizations opposed the establishment of PAIPO on the grounds that they were not consulted before the making of the decision by the AU heads of state and that a single regional organization was not feasible due to lack of harmonization of IP laws and administration. This is true in that there is a difference in the approach of administering intellectual property under the two sub-regional organizations. OAPI

receives and processes applications and grants a title that is valid in all member states. Under the ARIPO system, the organization receives and processes patent and trademark applications designating member states. It may decide to grant a patent or register a trademark but the patent or the trademark registration will only be valid when it is accepted by the member states.

There are 21 African countries that do not belong to the two organizations. Examination of the IP laws and administration of these countries reveal differences in approach and level of development. For example, there are countries such as Egypt and South Africa, which grant a patent that fulfils formal requirements, while countries such as Ethiopia and Mauritius require substantive examination. Moreover, some of the countries such as Eritrea do not have intellectual property laws such as patent and trademark legislation.

A possible solution to the problem that is consistent with the decision of setting up a PAIPO could be the adoption of a phased approach. The PAIPO might be given an IP policy formulation, coordination, advocacy, norm setting, designing and streamlining regional positions on issues of concern at the international level, building IP policy capacity in member states and related activities at the initial stage and evolve to include IP administration at a later stage.

IP policy capacity in African countries

An important issue for African countries is their capacity for IP policy formulation. A particular complication is the fact that IP is a cross-cutting issue (Blakeney and Mengistie 2011b). This is particularly the case in relation to GIs, which may involve ministries of agriculture, industry, science and technology and trade, as well as IP offices. A number of international and transnational organizations and agencies in addition to the WTO are now concerning themselves with this subject and within countries a range of government ministries and departments have an interest in IP matters.

The WTO is an organization with representation from trade ministries. Participation in the World Intellectual Property Organization (WIPO), which is the specialized agency of the United Nations concerned with IP matters, is usually undertaken by officials from IP offices, and ministries of industry and science. The World Health Organization (medicine) and UNESCO (education and culture) have IP mandates and ministries of agriculture are involved in the activities of the Food and Agriculture Organization (FAO) and the International Union for the Protection of New Varieties of Plants (UPOV) and are involved with environment ministries in the IP activities of the Conference of Parties (COP), of the Convention on Biological Diversity (CBD) and the United Nations Environment Programme (UNEP). Finally, police and customs departments are involved in the IP enforcement activities which are coordinated internationally by Interpol and the World Customs Organization.

As the country representatives who participate in the meetings of these bodies meetings are selected from different ministries, with different cultures, it is not surprising that different policy approaches have emerged. The diversity of organizations

in different locations makes it difficult for African countries to secure effective representation. Invariably, for those countries that are distant from the places where the negotiations are occurring, their national representation is usually undertaken by the local diplomatic representative, who is usually responsible for liaison with a variety of different international organizations and may have inadequate knowledge in relation to the issues discussed.⁷ Permanent missions of developing countries to UN organizations are often understaffed and lack qualified experts to meaningfully take part in international negotiations that will impact their countries. Moreover, diplomats of African countries have often complained that they receive little support from their capital that will enable them to effectively take part in the international negotiations. This could also be attributed to lack of expertise in the field of intellectual property and issues discussed at various international fora.

In most African countries, as with the various international and intergovernmental organizations listed above, elements of IP are included in many of the non-IP policies, but some countries have initiated institutional reforms in support of IP policy formulation. The coordination of IP policy across governments, between governments and the private sector and with international and regional bodies can be secured through the involvement of all key stakeholders in a national IP council. In Africa, IP policies have been prepared by Ethiopia, Kenya, Malawi, Mauritius, Rwanda, South Africa, Uganda and Zambia. Rwanda and Zambia are pioneers in Africa in that they had already issued their national IP policies in 2010 and begun implementation of them.⁸

It should be noted that the development priorities of African countries differ from country to country and from region to region but common to all countries is securing access to foreign investment, the acquisition of technologies, the promotion of research and development and the establishment of a sound industrial base, the promotion of education, securing access to medicines and the establishment of food security. GIs protection can make a contribution in a number of these areas, but most particularly in relation to food security.

Serious challenges to food security in developing countries and in LDCs have been caused by the dramatic escalation of food prices from the beginning of 2008. The High Level Conference on World Food Security convened by the FAO in June 2008 noted that during the first three months of that year, international nominal prices of all major food commodities reached their highest levels in nearly 50 years while prices in real terms were the highest in nearly 30 years.⁹ The High Level Conference observed that the constriction of food supplies was caused by the shift of farmers into the production of biofuels and also the impact of global warming on food supplies. The Declaration issued by the High Level Conference in Article 3 identified 'an urgent need to help developing countries and countries in transition expand agriculture and food production, and to increase investment in agriculture, agribusiness and rural development, from both public and private sources'.

It should be acknowledged that the enhancement of food security requires a package of policies that address the supply, distribution and consumption aspects of the food chain. The development of GIs can make a contribution in each of these areas (see Blakeney 2009).

Economic contribution of GIs

In signalling the association between product quality and origin, the GI provides both a trade benefit in generating market appeal and a non-trade benefit of promoting local agricultural traditions and methods. In relation to the first benefit, the ability to charge premium prices is attributed to GI branding, as well as the use of GIs as a tool in decommodifying commodity markets (see Galtier et al. 2008). Non-trade benefits are embraced by the concept of rural development.

GIs and premium prices

A number of studies have sought to demonstrate that products sold under GIs command premium prices in a number of markets (Barjolle and Sylvander 2000; Loureiro and McCluskey 2000; Tregear 2002). Surveys of some 16,000 consumers in the EU in 1996 and 1999 indicated that around 43 per cent were willing to pay a price premium of 10 per cent for a GI product, compared with 8 per cent who were willing to pay a price premium of 20 per cent (Berenguer 2004). A study by O'Connor and Company in a study for the ACP (O'Connor and Company 2005) found that in the EU, the price difference between PDO and PGI products and similar products without such designations was on average 10–15 per cent. In relation to specific agricultural products in the EU, Larson (2007) points out that although the production costs of Swabian Hall Pork Meat are 12 per cent higher than those for standard pork, this cost is compensated by a 20–30 per cent price premium in the German market. The profitability of dairy farms producing cheese under the Comté GI is 32 per cent more profitable than similar farms outside the GI region (Bowen 2008) and producers of Italian Toscano olive oil have managed to increase prices by 20 per cent since it was registered as a GI in 1998 (Babcock and Clemens 2004; Origenandino 2008). As the first preamble to the 2006 EC Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs¹⁰ declared: 'The production, manufacture and distribution of agricultural products and foodstuffs play an important role in the Community economy.' Thus today in the EU, the 640 GIs and designations of origin for foodstuffs, and over 4,200 registered designations for wines and spirits, together generate a turnover of more than €40 billion annually (O'Connor and Company 2005: 3). Similarly, the second preamble to the EC Regulation states that:

The diversification of agricultural production should be encouraged so as to achieve a better balance between supply and demand on the markets. The promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas.

Studies have begun to be undertaken in developing countries. Carambas (2007), in an examination of the impact of labelling organic rice in Thailand, found that a price

premium is chargeable for eco-labelled rice, in both farm and export markets, with greater profits than for conventionally produced, non-labelled rice. Suh and MacPherson (2007) indicate similar results for Boseong green tea in South Korea, with the incidental benefit of increased tourism in the tea production area.

As is indicated in Chapter 2, the costs of establishing a GI and its promotion need to be deducted from the price premium that is received by the producers. This is particularly the case in international markets where the GI may not yet enjoy a reputation (Das 2009). It has been pointed out that, particularly for developing countries in an environment of changing consumer tastes, marketing strategies are high risk investments (Yeung and Kerr 2011; Bramley 2011). In developing countries, promotional efforts can be undertaken in association with government authorities, for example, in promoting tourism to GIs production areas. Examples of recently developed agricultural markets that illustrate the marketing potential of GIs for developing countries are the growth of the global organic market which is said to account for between 1 per cent and 3 per cent of the global food market (Millstone and Lang 2003) and the growth of the European Fair Trade market.

It should be pointed out that, even among European countries, there is a significant variation in the appeal of products marketed by reference to their origin. A 2001 study indicated that 80 per cent of French and Spanish consumers purchased products labelled by their origin compared with 8 per cent in Sweden (Gracia and Albisu 2001). In the UK, a 2005 study suggested that 12 per cent of consumers purchased on this basis (Groves 2005).

GIs and decommodification

GIs are an important tool to permit the decommodification of otherwise undifferentiated agricultural products such as tea and coffee. The establishment of GIs allow those involved in the value chain to seek to differentiate their product on the basis of quality related to origin. Galtier et al. (2008) describe the design process of a coffee GI in Dominican Republic for 'Pico Duarte coffee' as a means of attracting a premium price. They point out that the meaning of the GI utilized by developing country producers will often be quite different from the European meaning, which typically emphasizes the *terroir* effect, whereas in many developing countries the GI is an assurance of a high level of consistent quality on the market, 'but with less attention to the human, historical, and cultural specificities of coffee quality of the area' (Galtier et al. 2008: 11). A GIs-type option that has been proposed in the US is the creation of Farmer Owned Brands (FOB), as a means of creating value for farm produce (Hayes et al. 2003). This is an attempt to create brand appeal by the collective effort of farmers producing a homogeneous product originating in a particular area.

GIs and rural development

GIs have been identified as a significant tool in rural development policy (see Ray 1998; Marsden et al. 2000; Tregear et al. 2007; Belletti and Marescotti 2011). The role

of GIs to sustainable rural development objectives was referred to by the European Commissioner responsible for Agriculture, Rural Development and Fisheries. He noted that:

several studies have shown that they have an important role to play in the regeneration of the countryside since they ensure that agri-foodstuffs are produced in such a way that conserves local plant varieties, rewards local people, supports rural diversity and social cohesion, and promotes new job opportunities in production, processing and other related services. The needs of today's population are met, while natural resources and traditional skills are safeguarded for generations to come.

(Fischler 2004)

In recent years, the use that the EU has made of GIs as a tool to consolidate the reputation and market niche of certain agricultural products has been supplemented by the motive to use GI protection as a 'potential political and economic "counterweight" to the threat that subsidies reduction and increased market access commitments could represent to its agricultural production' (Vivas-Eugui and Spennemann 2006: 24). The protection of GIs is seen as a means of changing the EU's Common Agricultural Policy (CAP) to one with a focus on quality rather than quantity. The CAP aims to create better-paid employment in rural areas and to motivate young people to continue to be involved in agricultural activity through the generation of premium prices.

An illustrative example is the result of the protection of 'Lentilles vertes du Puy', which is said to have increased the production of lentils from 13,600 quintals in 1990 to 34,000 quintals in 1996 and 49,776 quintals in 2002, the number of producers almost tripling from 395 in 1990, to 750 in 1996, and 1,079 in 2002 (O'Connor and Company 2005: 4). It is estimated that France has 593 GIs registered under the general EC rules, for wines and spirits and for foodstuffs, generating €19 billion for 138,000 agricultural enterprises and that Italy's 420 GIs generate a value of €12 billion and give employment to more than 300,000 Italians (O'Connor and Company 2005: 7).

It should be noted that the rural development benefits of GIs in Europe are a consequence of the slow evolution of local values and traditions, which have become part of the patrimony of the local community (see Bérard and Marchenay 1995). An important question is whether GIs are capable of being developed in African countries which are considerably younger than European countries. However, as Bérard et al. (2008) point out, a GI can serve as a catalyst for local community action in relation to products which are part of the patrimony of the local community. This patrimony will have endured from before the incorporation of local areas within modern states and thus GIs can be used in Africa to catalyse patrimonies which will have endured for at least as long as those in Europe.

Finally, it has been pointed out that the legal certainty created by GIs may enhance investment in the area designated by the GI (Zografos 2008).

Distribution of revenues

The agro-food industry is characterized by the production of standardized food in which producers must contend with the economic power of processors, distributors and retailers who are interposed between them and consumers. GIs permit the aggregation of market power by small farmers to enable collective action by producer collectives in relation to the promotion and marketing of their products and in dealings with intermediaries. The evidence from Europe is that the success of policy measures promoting GIs has resulted from the careful implementation of effective marketing, pricing and distribution strategies (Rangnekar 2004: 16). In the African countries surveyed in the case studies in this book, the producers of products that have potential for GIs are quite remote from those marketing the products at the end of the value chain. A means has to be found to share the enhanced profits from GIs which will be received by those selling the products to end consumers with the farmers at the beginning of the value chain.

Jena and Grote (2010) point out that the capacity of GIs to improve the livelihoods of producers in developing countries is closely related to the equitable distribution of benefits along the supply chain to producers. In a number of countries, national marketing authorities established by legislation acquire products from producers and tend to sell them to a few large purchasers who impose a purchasing price upon the national marketing authority, which tends to accept what it is offered (see Hughes 2009). The farmers will receive an amount after the marketing authority's sometimes bloated administrative costs have been deducted. As a consequence, farmers in a number of markets are prepared to sell their produce to smugglers who can pay them many times the amount offered by the government marketing authority. Thus, for example, the price for cloves sold in the Mombasa auctions in Kenya is considerably higher than the price offered to farmers by the government clove marketing authority in Zanzibar. As Kenya does not have clove growers, most of the tonnage sold is smuggled from Zanzibar. The end price for cloves paid by consumers in Europe is then 10–20 times the price paid to clove producers in Zanzibar. For producers to be able to benefit from these high revenues, the power of national marketing authorities, with their expensive bureaucracies, must be eliminated or reduced. Producer associations have to play a greater role in marketing and promoting their products in end markets. In enabling the aggregation of market power, the GI is a step in this direction. However, a significant amount of capacity building is required in African and other developing countries to enable producers to share the benefits from GIs-based trade.

Finally, consideration has to be given to the implications for rural development arising from the emergence of new relationships as the supply chain is modified by a GI (Hinrichs 2003; Bowen 2008).

Other benefits

The GI has also been identified as a guarantee of food safety. This has become particularly important where agricultural diseases such as BSE and Avian Flu are attributed

to particular localities (Echols 2008: 8). The explicit identification of origin for the purposes of guaranteeing food safety and traceability has been identified as a significant new trend in marketing (see Tregear and Giraud 2011).

It has been suggested that the traditional agricultural knowledge of traditional farmers and indigenous people could be protected through geographical indications (Blakeney 2002). Addor (2003: 2) stated: 'GIs are based on collective traditions and a collective decision-making process; they reward traditions while allowing for continued evolution; they emphasise the relationship between human efforts, culture, land, resources and environment.' As the overwhelming majority of the food insecure population of the world lives in rural economies, any benefit that a system of GIs can secure is going to be very significant. Plant breeding by the large life-sciences companies has been criticized for encouraging monocultures. In fostering agricultural diversity, GI systems contribute to the preservation of natural resources. In this context, the protection of traditional knowledge in the field of agricultural plant genetic resources offers the potential of 'appropriate flanking policies' (Biber-Klemm et al. 2005).

It has been observed (by Evans and Blakeney 2006) that 'it is a matter of historical irony' that notwithstanding the ancient provenance of GIs current developments in the institution are a local reaction to the industrialization and globalization of agricultural production, where the global marketplace provides opportunities for the diversification of agricultural products and foodstuffs. From the commencement of discussions regarding a system for the multilateral protection of GIs, as well as the scope of the extended protection for GIs, as is discussed in Chapter 6, a number of developing countries have espoused GIs as a useful means exploiting intangible values associated with their distinctive agricultural and handicraft products.

Notes

- 1 WIPO, 'What is WIPO?', available at www.wipo.int/about-wipo/en/what_is_wipo.html, accessed 26 August 2011.
- 2 WIPO Doc. CDIP/5/7, 22 February 2010.
- 3 WIPO Doc. WIPO/GRTKF/IC/19/12, 30 September 2011.
- 4 EC 'Implementation of Article 66.2 of the TRIPS Agreement', WTO Doc. IP/C/W/480/Add.5 (2007).
- 5 Société Française d'Économie Rurale.
- 6 Some of the findings of this project are published in E. Barham and B. Sylvander (2011) *Labels of Origin for Food. Local Development, Global Recognition*, Wallingford: CABI.
- 7 This may not always be the case, as many of the LDCs may not have representatives based in countries where international organizations sit and negotiations are made. For example, CIPR (2002) indicated that there are 36 developing countries that are members of WTO and 20 least developed countries that are members of WTO and WIPO that do not have permanent missions in Geneva. It is often the case that these countries assume obligations arising from negotiations in which they do not participate.
- 8 An example in this regard is the accession of Rwanda to the Lusaka agreement that established ARIPO and the various IP agreements administered by the organization in line with the direction set in the IP policy. Rwanda became the 18th member of ARIPO and the Harare Protocol on 24 June 2011.

- 9 See FAO Declaration (2008) 'Soaring Food Prices: Facts, Perspectives, Impacts and Actions Required', FAO Doc. HLC/08/INF/, para 1. Available at www.fao.org/fileadmin/user_upload/foodclimate/HLCdocs/declaration-E.pdf.
- 10 Council Regulation (EC) No 510/2006, 20 March 2006.

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5

ASSESSING THE ECONOMIC IMPACT OF GI PROTECTION

Thierry Coulet

Based on a short synthesis of the economic theory of GIs, this chapter proposes a pragmatic methodology for assessing the potential economic impact of GI protection. After a brief review of the economic literature, it will thus try to identify the major benefits and costs that are most usually attributed to GI protection and will finally detail the quantitative and qualitative methods that can be implemented in order to assess these benefits and costs.

The economic analysis of GI protection

Looking at what the economic theory says about the GI protection is a prerequisite to the understanding of the potential effects – positive or negative – of introducing a GI.

Conceptually, a geographical indication can be considered as a club asset shared by firms acting on a specific territory in the production of a given and specified good (see Benavente 2010). The following synthesis largely relies on the literature review included in this article.

A club good is characterized by partial excludability, no or partial rivalry of benefits and congestion phenomena (Buchanan 1965). On the other hand, a club can be defined as a voluntary group deriving mutual benefit from sharing one or more of the following: production costs, the members' characteristics or a good characterized by excludable benefits (Comes and Sandler 1996). In addition to excludability and rivalry, club goods hence share three key features: the membership to the club is voluntary, it involves sharing of benefits, without excluding partial rivalry, and the club has an exclusion mechanism at some cost.

Building on this theoretical basis, the geographical indication can indeed be defined as an intangible asset which consists in an identifiable, non-monetary resource, not material or physical in nature, which constitutes a legal claim to future benefits (Benavente 2010).

It is worth noting that the reputation of the good is at the core of the value of its geographical indication. Indeed, the value of the GI relies on a pre-existing reputation and aims at enhancing it. From this analysis stem several observations.

The immaterial asset that the GI represents can appreciate or depreciate over time and, in particular, as a consequence of the behaviour of its owners, that is the members of the GI club, which can impact the reputation of the GI-labelled good in terms of quality and/or reliability. Collective action among GI-right-holders thus appears to be critical in order to avoid problems attached to what is known in economic theory as free-riding, which consists of opportunistic behaviour by one or several members of the GI club, benefiting from the club asset without respecting the constraints attached to it and putting the reputation of the GI good, that is the value of the club asset, at risk (see Rangnekar 2003).

If this coordination is critical, another risk then nevertheless arises to see this coordination leading to anti-competitive behaviour (see OECD 2000). Under an excessive coordination scheme, the market equilibrium for a GI-labelled product could well be similar to a cartel equilibrium, characterized by a higher producer surplus, a lower consumer surplus and a substantial reduction of the overall surplus, that is the global economic welfare.

A model developed by Winfree and McCluskey (2005) on collective reputation effects can be profitably used in the analysis of the allocative, competitive and welfare effects of GIs. This model considers reputation as a common property extracted by firms and builds on the previous model of Shapiro (1982) on individual reputation, on which basis Shapiro had shown that a price premium is a return on the asset value of reputation (Shapiro 1983).

Beyond these direct impacts on the market equilibrium, introducing a GI will most probably entail long-term dynamic effects.

Building on the approaches of Shapiro (1982) and Winfree and McCluskey (2005), Benavente (2010) develops a model whose main focus is to explore the relationship between the size of the membership to the GI club, the quality of the product and, in the end, the value of the club asset that the GI protection constitutes. This analysis thus aims at assessing club reputation dynamics when quality is considered as endogenous. In other words, the equilibrium level of quality is there a function of membership. Benavente shows that there could be an inflexion point in the size of the membership to a GI club of producers, up to which the equilibrium quality increases and after which it decreases.

The model also explores the respective impacts on quality and profitability of a bottom-up, firm-driven approach to optimal membership versus those of a top-down, state-driven approach. In the first case, it shows that, as long as the use of the GI name is restricted and as long as the GI product is highly valued and differentiated, the market equilibrium will command a higher quality level and a higher profit at the industry level than that which would be observed in the absence of any GI. This means that countries would not need to impose cumbersome and expensive structures for the development of GIs for some, at least, of their potential to develop as a market outcome (see Benavente 2010: 22). On the other hand, a top-down, state-driven

approach to optimal membership, based on the maximization of the club profits, in contrast to the maximization of firm profits that would characterize the bottom-up approach, will lead to a greater optimal level of membership and a lower level of quality than the bottom-up approach.

This dynamic analysis is complemented by a partial equilibrium approach in which quality is considered as exogenous under no rivalry or partial rivalry conditions. This approach allows to explore the impact of state subsidization and the relation between geographical confinement and factor markets. It also explores the competition implications of GIs and, in particular, the risk of seeing a GI club evolve in a cartel-like group characterized by oligopolistic behaviour and the risk of observing the development of a monopsonistic behaviour. It is worth noting in particular that, beyond the direct economic impact on producers and consumers, a GI may also have an indirect but important impact on land and factor prices.

To sum up, introducing the protection of a GI may, in a dynamic-static approach, have an impact on all the key factors of the market equilibrium, i.e. the prices at different stages of the value added chain, the volumes of production, the producer surplus and the consumer surplus.

All these analyses developed in the economic literature give some insights into what kind of impact can be expected from the introduction of a GI protection and, above all, into the conditions and circumstances under which such positive or negative impacts can be expected. The key features in this respect relate to the market structure of the goods considered and to the competition structure of its production sector. If some of these conditions and circumstances can be influenced or modified by a proactive policy, many of them can be considered as exogenous, at least in the short term.

Other factors, of a strategic or social nature, should also be taken into account while striving to get an overall picture of the potential impact of the introduction of a GI protection. The next section tries to give a comprehensive picture of these factors while the section that follows it tries to define quantitative and qualitative methods that can be implemented in order to assess these factors.

Potential benefits and costs arising from GI protection

It should be noted first that, as shown in the case studies in this book, a GI often has a public good dimension in the sense that a GI has a social and sometimes a cultural impact that goes beyond its purely economic effect on producers and consumers, at home or abroad.

Probably the most comprehensive analyses of the potential benefits and costs and of the broader socio-economic impacts that could arise from a GI protection have been developed by Jorge Larson (2007) and Sisule F. Musungu (2008). The following mostly elaborates on these analyses.

Potential benefits of a GI protection

Based on an extensive literature review, Musungu (2008) has identified the main potential advantages and benefits related to a GI protection. We should distinguish,

for the purpose of this economic analysis, between what constitutes a potential economic benefit of a GI protection as such and broader socio-economic advantages and benefits.

Potential economic benefits

A key aspect in this regard, which has been extensively developed in the previous section, is that a GI is constitutive of an immaterial asset, the reputation of the product, which constitutes a signal to the consumers regarding a specific quality, potentially drawing a higher price or, as it is often labelled, a premium price.

Should the producers be fully committed to preserving the value of the immaterial asset that the GI constitutes, it could even lead to transforming a sector of generic goods into an exporting process chain of high-quality agricultural and handicraft products. The question of the impact of a GI protection on quality is, as seen in the previous section, one of the most researched in the economic literature. As said in this section, there appears to be specific conditions, related in particular to the membership of the GI community of producers and its size, which strongly affect this potential impact.

Musungu, again, considers that, as GI governing bodies are most often collective entities focused on regional identity, they could bring about the type of governance needed to transform supply chains into value chains that create value added. As seen in the previous section, this value added could take shape through increased volumes of production or through higher prices (premium prices) charged to the final consumer.

The collective approach to GIs could, on the other hand, benefit small producers that would normally not be able to finance marketing and brand development activities. This advantage is intrinsic to the club asset character of the GI as it was developed in the previous section. As shown therein, the value of this club asset can still increase or decrease depending on several factors and, in particular, on the size of the GI club membership and on the behaviour of its members.

Musungu also notes that, when reputation already exists, small farmers may benefit from a GI protection coupled with niche market development. This point raises the question of the prior reputation of any good considered for a GI protection. Indeed, it seems that this prior reputation might be a critical factor in the success of the GI protection. When it already exists, the GI label could be used to strengthen this reputation, formalize its quality basis and prevent any fraudulent use of it.

GIs have in addition the potential of being associated with other market incentives, such as organic or fair trade certification. This label could hence be of particular interest for small producers of natural goods. In contrast, the convergence between a GI protection and a trademark raises some questions. Although it is conceivable that some production process related to a GI good might be patented, it is usually not the case. And since GIs are based on tradition, potential patents rights are probably forfeited or unclaimed (see Benavente 2010: 50).

Musungu (2008) also considers that a GI protection could have a kind of 'spill-over' impact that could benefit small producers at no cost. Indeed, once small producers have achieved the quality standards required to access new markets, precise use of

geographical information in labelling could, according to him, easily be implemented with or without GI registration.

GIs are also important to prevent the delocalization of the production and to develop the local added value content, since a GI can only be produced in a given area or locality. Still, this delocalization remains a possibility and the GI specifications clearly have to strictly define the product and the production process in order to avoid such a delocalization. A loose definition of these aspects could indeed allow some key operations, in particular those yielding the highest value added, to be delocalized while benefiting from the geographical indication.

Finally, beyond its potential impact on valuation (premium price) and quality, that is the nature of the good, a GI could also have an impact on the volume of the market. We should distinguish in this respect the impact on existing markets, in the form of an increased market share of the GI product, and the impact on other markets, in the form of penetration of new markets.

Broader advantages and benefits potentially attached to a GI protection

According to Musungu (2008), GIs, unlike patents, would require very low levels of innovation, if any, which would allow a larger number of producers to apply for a GI protection without having to endure the costs and investments that could be related to innovation. It is indeed a well-documented feature of GI products that they relate, by nature, to tradition and cultural aspects and this feature could even be considered as antinomic with innovation. According to Musungu, since GIs predominantly apply to agricultural and cultural products, African and other developing countries could, in addition, have a natural comparative advantage in this respect. If so, GIs could constitute the core of a development strategy that might have been underestimated so far.

GIs could also help prevent bio-piracy and piracy of traditional knowledge as well as helping to protect or provide recognition to traditional production methods such as seed selection and food conservation practices. This would, in many cases, permit the transformation of traditional knowledge into marketable products.

Finally, GI production systems and processes based on well-managed extractive activities would promote conservation of natural vegetation and forested areas which would, in turn, benefit ecosystem and landscape conservation. Strong links between products and culture could, in addition, benefit rural development.

Potential costs, disadvantages and conditions attached to a GI protection and its success

As seen above, the potential benefits and advantages of introducing a GI are numerous and important. Still, potential costs and disadvantages attached to a GI protection and conditions on its success should not be neglected.

This analysis mostly relies and elaborates on Musungu (2008) and Larson (2007). These authors identify several potential drawbacks of a GI protection, which can consist in direct costs attached to the GI protection, in difficulties associated with its

development, including the conditions of its success, in inherent limits and, finally, in potential negative effects of a GI protection.

Direct costs attached to the development and enforcement of a GI protection

The direct costs attached to the development and enforcement of a GI protection are numerous and of a very uneven importance. These direct costs consist in institutional, organisational and promotional costs which have been detailed in several studies.

According to Musungu (2008), building on an analysis made by O'Connor and Company and Insight Consulting (2007), the main costs to be faced in both the domestic market and the export markets in relation with the registration and the enforcement of a GI protection are the following:

- Application fees;
- Search fees;
- Advertisement fees;
- Publication fees;
- Costs in opposition proceedings;
- Litigation costs;
- Renewal fees (mainly in cases of trademarks);
- Fees for change of address or name;
- Fees in case of assignment;
- Fees for correction of clerical or other errors;
- Charges for amendment to application or registration; and
- Attorney's fees for preparation and legalization of documents.

It should be noted that this analysis does not take into account the costs that are related with the implementation of the GI system as such and with the development of a specific geographical indication. These will be considered below.

Difficulties associated with the development of a GI protection and conditions for its success

It comes out from the literature that the development of a GI protection is in itself a complex process. This complexity means that specific conditions must be fulfilled to secure the success of a GI.

For Larson (2007), formal and well-distributed knowledge and information about biological resources and cultural practices with GI potential seems to be generally lacking in developing countries. Although these countries could – in consideration of the diversity of their agricultural and handicraft products that could potentially benefit from a GI protection – have a comparative advantage in this respect, strong capacity building and, more generally, technical as well as financial assistance would be required in order to help these countries effectively seize these opportunities.

One specific problem is related to the fact that small farmers or producers cannot usually produce surpluses that would allow them to participate in market-oriented activities such as GI development. This underlines the need for a strong public, and probably international, support to such activities.

The basic economic logic of GI protection relies on a form of product differentiation. Such a differentiation is well known to have the potential to improve the situation of producers through both increased market shares and a higher value added content of their product. Still, according to Larson (2007), differentiation of production processes, qualities and markets will be difficult to achieve without operating governance structures that are respectful of local culture. The organizational and institutional aspects related to the composition and working of the GI governance body will thus have a deep impact on the real benefits that can accrue from this particular form of differentiation.

It is essential, in this respect, to take into account the fact that complying with labeling, safety and traceability regulations represents a significant organizational and technical challenge to many small organizations. Capacity building and technical assistance to small producers all along the unfolding of the GI development and implementation processes will thus, once again, be critical to their success. In the same order of ideas, it should be taken into account that a statutory declaration of GIs, without the implication of the relevant operating bodies, may fail to connect GIs to rural development policy.

More generally, he notes that GIs, especially where they are related to agricultural products, may not succeed if their development is isolated from complementary agricultural and rural development policies including economic support.

Finally, the organization and management of this support are also key to the success of the overall process. One could fear, indeed, that legal frameworks and support measures from different government arms may not be well coordinated, producing a complex scenario for GI development.

Limits of the GI protection

Even though all the conditions for the success of a GI, as listed above, may be fulfilled, one should be aware of the inherent limits of a GI and should not base too many hopes on its introduction.

Clearly, a GI protection will not be able, most of the time, to radically change the situation and solve all problems faced by the farmers or producers concerned. Putting too many expectations on the GI protection only and neglecting other key aspects or strategies could even constitute a risk to the development of a given branch of activity or region and to the improvement of the situation of the individual producers.

More specifically, Larson (2007) notes that small producers are vulnerable in national and export markets for economic and scale reasons that cannot be addressed solely with GI differentiation.

This means that it is necessary to proceed with a global assessment of the economic constraints facing the individual producers and to integrate the protection of a GI into a global strategy for the development of a sector.

In addition, although evidence of economic benefits from GI protection can be found in developing countries, the distribution of benefits within value chains is unclear and that several cases point to a concentration of power in transformers and distributors' hands. The distributive effect of the introduction of a GI protection is an aspect of the utmost importance that has to be addressed prior to any decision on the development of such a protection. It should be underlined in particular that, in the absence of democratic governance structures, the value added brought about by a GI may not be capitalized by regional interests or small farmers.

Finally, according to Larson again, employment generated by GI may contribute to the rural economy but not necessarily generate benefits for biodiversity conservation and small farmers.

Potential negative effects of a GI protection

The introduction of a GI has not only a cost but, under certain circumstances, it may even have some negative or perverse effects that have to be carefully analysed and, if possible, neutralized before any move in that direction is made.

First, and as seen above, introducing a GI may lead to a concentration of power within the value added chain and there is a risk to see the value added created by the GI be captured not by local individual producers but by other stakeholders, possibly out of the region of production and even abroad.

Besides, and according to Musungu (2008) and Larson (2007), linking a GI to a specific variety, breed or sub-species as a response to productivity and market demands may in particular marginalize other genetic resources that are biologically and culturally relevant. This means that the overall impact of a GI protection on biodiversity, and more generally on ecosystem and landscape conservation, could still be questioned as some arguments play in one direction, as seen above, and others in the opposite one.

Larson (2007) points to another potential negative effect which lies in the fact that market segmentation that would attend only to high-end niches may generate economic exclusions or inhibit access to nutritious and culturally valuable resources by local or low-income populations. These exclusion impacts on the demand side are clearly to be assessed prior to any decision regarding the development of a GI protection, especially, of course, when first necessity products and low-income populations are concerned.

Beside this exclusion impact on the demand side, the introduction of a GI protection may also have an exclusion impact on supply. In particular, it should be taken into account that formal definitions of quality imposed by external stakeholders could provoke exclusions of legitimate but culturally different producers.

Finally, the question of the ownership of the GI is a clearly very sensitive one that could condition its impact. It should be noted that ownership of culturally sensitive GIs by the state may in particular lead to conflicts with indigenous peoples.

What clearly comes out of this analysis of the potential benefits and costs associated with a GI protection is that these benefits and costs are of a very different nature,

some of them being strictly economical while others have a broader socio-economic content, some of them constituting direct impacts to be witnessed in a pretty short period of time, others constituting indirect impacts that could be felt later. Only the purely economical, short-term or long-term, aspects are considered below.

A pragmatic approach to evaluating the economic benefits and costs of a GI protection

As seen above, the economic literature suggests that positive market and value impacts can be expected from the introduction of a GI protection. Still, these positive impacts highly depend on key characteristics of market and production structures, including features of the value added chain. These characteristics can be of a quantitative or qualitative nature. The following sections detail these features, the information required to assess them and the methods to be implemented in order to collect and treat this information.

Evaluation of benefits

The evaluation of the benefits potentially attached to a GI protection, as identified above, be it in terms of premium price captured by local producers, of increased market shares of their product on existing export markets or of development of new markets, requires a clear and comprehensive picture of the market and production structures, as well as of the nature and characteristics of the value chain. This characterization should be primarily based on quantitative data, some qualitative information still being necessary to complement or help interpret this quantitative information. We will see successively what kind of quantitative and qualitative information on, first, the domestic sector of production and, then, the major export markets, would be required in this analysis and how this information could be produced.

The information required on the domestic sector of production

As said, this information is of a quantitative and of a qualitative nature.

The quantitative information required

Quantitative information is absolutely necessary to understand the market and production structures associated with the good considered. Before gathering, or producing any figure relating to these structures, a first necessary step consists in the identification of the value chain and of all the actors of this chain. This implies, in turn, to clearly define the product, or products, to be covered by the GI protection.

As the products considered for a GI protection are, most of the time, natural products that undergo minimal transformation, this production chain may well, in most cases, consist in only one or two types of actors, i.e. primary producers (farmers, stock-owners, fishers, etc.) and transformers (craftsmen, dairy product producers, pork butchers, etc.). On each of these specific components of the value chain, a string of

information is required to assess the potential price and production impact of any substantive change in market configuration, such as, in particular, the one involved by the introduction of a GI protection.

For each segment of the value chain, some key data are required in order to assess the potential economic impact of a GI protection on the sector. These data can relate to individual producers or to the economic sector as a whole. They can also consist in derived indicators.

Data required on individual producers and actors of the value added chain:

- Turnover;
- Number of persons employed (total and full-time equivalent);
- Number of employees (total and full-time equivalent);
- Volume of production in real terms (tons, litres, m³, etc.);
- Value of production;
- Value added; and
- Volumes and values of exports by main export market.

Data required on the economic sector as a whole

The analysis of the sector's structure is key to understanding the power relations within the value added chain and hence the potential distributive effects of a GI. This analysis requires to gather the following key data:

- Total number of producers and actors at each stage of the value added chain;
- Size structure of the sector in terms of employees and production: the production of this picture of the size structure first supposes to define significant size classes in terms of both employees (or persons employed) and production value;
- Volume of production in real terms (tons, litres, m³, etc.);
- Value of production;
- Value added; and
- Volumes and values of exports by main export market.

Derived indicators to be calculated

- Concentration ratio: Based on the production values collected, this concentration ratio can be calculated in several ways. First, in a simple approach, it can be calculated as a composite index based on the market shares of the single biggest producer, of the five biggest producers and of the ten biggest producers. A more sophisticated concentration ratio is made of the so-called Herfindahl-Hirschman index, which is defined as the sum of the square of the market shares of every producer, expressed as a percentage. This ratio can vary between the values 0 and 10.000, 0 corresponding to a perfectly atomistic competition structure and 10.000 to a monopolistic situation. Most important in the interpretation of this index is the possible divergence between the value of Herfindahl-Hirschman index at one

stage of the value chain and its value at another stage. This divergence could indeed indicate a market power of one segment (the most concentrated one) on the other (the most atomistic one);

- Average price and price index;
- Price-elasticity, that is the relative product demand evolution in relation with a given price evolution for this product. This price elasticity measures the sensitivity of demand to a given price change and is hence a critical indicator to understand the potential impact of a GI on the price of the product concerned;
- When the product considered for a GI protection is facing substitutable products on its market, the substitution price-elasticity, that is the relative demand evolution of one product in relation with a price evolution of the other, should also be calculated. This indicator is also key to understanding the potential impact of a GI on the price of the product concerned.

In addition to these key data, further quantitative information would be useful relating in particular to the cost structure of the production unit and of the economic sector as a whole, that is, chiefly, the main components of its intermediate consumption and the share of wages and salaries in total costs.

A methodology for the production of quantitative information

The primary information detailed above should, in principle, be available at the National Statistical Office or at the ministry in charge of the sector's supervision. However, it can sometimes not be readily available or the available information can be partial or not fully reliable.

In this situation, it is highly recommended to engage in an exhaustive economic census of the producers and actors of the value added chain that could be concerned by the GI protection. Three critical steps have to be performed before this economic census can be undertaken. These prior steps are the following:

- A precise and unambiguous definition of the product(s) to be covered by the geographical indication;
- A precise definition of the area covered by the geographical identification; and
- A clear identification of the value chain: Identification of all economic activities implied in the production and distribution of the product(s) that would be covered by a GI protection.

The economic census itself should allow to gather all the information identified in the section above directly from the producers. It should, in addition, allow to gather additional information regarding:

- The date of creation of the company;
- The evolution of the number of persons employed and of the number of employees of the unit since its creation;
- The evolution of the turnover and of the value added of the unit since its creation;

- The whole productive activity of the unit: kinds of products produced, share of the product considered for a GI protection in this total production;
- The cost structure of the product considered for a GI: main elements of the intermediate consumption of the unit, costs associated, share of wages and salaries in the total production costs.

Once again, this exhaustive census is key to the understanding of the production structure. It should be greatly facilitated by the prior delimitation of the area to which the geographical identification would be attached. Still, a census or, at least, an identification of all the producers potentially competing with those in the GI area would also be very useful to understand the potential sideline effects of this GI.

The qualitative information required

Qualitative information is key to understanding and interpreting the quantitative information collected, both on production and on market structures. This qualitative information is also critical in order to complement the quantitative information described above and to understand, in particular, the nature of the value chain at stake.

In this respect, it is worth noting that two main kinds of value chains are usually distinguished, the so-called product driven chains and consumer driven chains. In the context of a consumer driven chain, it is likely that the ultimate benefits of a GI may not go to the small producers but rather to the supermarket chains in the export markets and changing this situation might require intervention in the value chain (Musungu 2008: 16). Still, we can consider that, in most countries, such an intervention can hardly be considered and, if possible, could only produce significant changes over a long period of time.

A methodology for the production of qualitative information

The production of a relevant qualitative information that could complement and help interpret the quantitative information defined above, should rely on the identification of the key stakeholders and on the development of specific questionnaires aimed at these different groups of stakeholders. When possible, the analysis of past experience will also be instrumental.

This qualitative analysis should thus rely on the implementation of three complementary procedures: the identification and consultation of all the stakeholders, the sharing of the information gathered in order to produce a common and consistent vision and, finally, the exploitation of the acquired experience.

The key stakeholders to be considered are first made, of course, of the producers, including both primary producers and potential transformers, but also of distributors of the products, local clients, exporters, experts of the product and its markets and national administrations in charge of the monitoring of the sector. Specific questionnaires should be used in order to collect information from these specific groups. The questionnaires developed for the production of the case studies grouped in this book are reproduced in Annex 2.

The collection and synthesis of this information is essential but it might, most often, not be sufficient to produce a consistent and reliable basis for understanding and completing the quantitative information. The individual interviews allow all of the stakeholders to deliver their vision of the sector, not to agree on a comprehensive and consistent picture.

In this respect, it is necessary to complete this first step of direct individual interviews by a kind of sharing exercise which could take the form of a sector workshop and should gather all the stakeholders met in the first step with the aim of producing a comprehensive, shared and reliable picture of the activity and of the production and market structures characterizing the sector.

This workshop should also be instrumental in the decision making and in the association of all the relevant parties to the decision regarding the launch of a process aiming at introducing a GI protection. It should be based on a synthesis of the quantitative information collected as above and of the qualitative information collected through the first step of this approach as well as of relevant case studies.

Indeed, most of the time, the product considered for a GI protection may be similar to a product that is already covered by a GI protection elsewhere in the world and whose protection and its impact may already be well documented and analysed. It is of course essential that, in the process of developing a GI protection, all this information regarding similar experiences, and their impact on the main export markets considered, be researched and carefully analysed.

The information required on the major export markets

In addition to this analysis of the domestic sector of production, the assessment of the potential benefit of the introduction of a GI protection clearly makes it necessary to analyse its potential impact on the main export markets of the product. Indeed, the potential direct benefit of the introduction of a GI protection for the country as a whole mostly relies on the impact this GI protection can have on the main export market(s) of the product. Therefore, first the main current and potential export markets must be identified. The first ones should be identified through the available foreign trade statistics and the second ones through the analyses of the producers and exporters.

For each of these export markets, or at least for those for which a GI protection could be considered, it is necessary to undertake a market analysis so as to assess and quantify the following elements:

- The current size and the potential evolution of the market;
- The existing knowledge and reputation of the product on this market;
- Its existing market share;
- The price-elasticity of the product on this market, or, in other words, the premium price that the consumer on this market would be ready to pay for a differentiated product based on a GI protection; and
- The potential volume growth associated with a GI protection.

This market study should also allow to assess what are the key success factors on each of these main export markets and, if possible, their relative importance. These key success factors, which can consist in price competitiveness, differentiation, quality, brand reputation and many other factors, can indeed clearly indicate whether a GI protection can yield a premium price, and to what extent, on this market.

The development of this analysis clearly requires to dispose of specific and reliable information about the main export markets of the products, that is about the values and volumes of exports by destination and their evolution over a recent period (in practice, the last decade). This information should, in principle, be available at the Customs administration or, in some cases, at the Ministry in charge of the supervision of the sector.

Finally, a real experience could also be undertaken in order to assess the potential impact of a GI protection on a given export market. The potential economic benefit of a GI protection on a specific export market could indeed be assessed based on a prior experience of GI marketing, without protection and hence without the costs attached to a formal protection. The reaction of the market, in terms of both possible premium price and increased market share, could be an indication of the value of the intangible asset that the geographical indication constitutes on this market and, hence, of the value of its protection.

Evaluation of costs

As seen above, the main costs to be faced in both the domestic market and the export markets in relation with the registration and the enforcement of a GI protection consist in institutional, organizational and promotional costs which can be detailed as follows (see Musungu 2008: 20):

- Application fees;
- Search fees;
- Advertisement fees;
- Publication fees;
- Costs in opposition proceedings;
- Litigation costs;
- Renewal fees (mainly in cases of trademarks);
- Fees for change of address or name;
- Fees in case of assignment;
- Fees for correction of clerical or other errors;
- Charges for amendment to application or registration; and
- Attorney's fees for preparation and legalization of documents.

In the analysis of the costs associated with a GI protection, we should first distinguish between costs incurred at home and costs incurred abroad, that is in the main export market(s), the first ones including, in addition to those identified above,

the costs of developing a GI protection system and the costs of developing a specific geographical indication. These two kinds of costs are considered successively here below.

Evaluation of domestic costs

According to Musungu (2008), various factors may impact the cost of setting up and running a GI regime in African countries. These include whether:

- legal reforms related to GI protection are undertaken in isolation or as part of a broader IP and trade law reforms. In the latter case, the costs for a GI system are likely to be lower;
- the administration of the GI regime is integrated with overall IP administration or is distinct;
- the country is party to a regional or international registration system such as the OAPI and ARIPO systems or the Lisbon system;
- cost recovery from registration and renewal fees is feasible or not;
- the enforcement of GIs, especially through litigation, is part of the general law enforcement or is dealt with separately. The costs will inevitably be higher in the latter case.

From a pragmatic point of view, the most important costs to be considered at home probably relate to the following operations:

- the development of a legal framework;
- the development of a specific GI;
- certification of individual producers;
- inspection of producers;
- inspection of retail outlets; and
- the cost associated with a possible litigation.

It should be remembered that, in most African ACP countries that are members of either OAPI or ARIPO, the legal framework is already in place, even though this could, in some cases, be adapted and ‘nationalized’ in the near future. This means that no specific cost is necessarily associated with the development of this legal framework.

The cost associated with the development of a specific GI clearly depends on the number of stakeholders involved and on the specificities of the product. It will thus be largely determined by both the complexity of the value chain and the number of producers at each step of this value chain. This information should be produced by the economic census described above.

This cost thus should be estimated as a function of the number of persons implied in the GI development process, its probable duration and the estimated number of days per person involved in the process over its whole duration. Case studies of past

and similar GI development processes could be instrumental in the evaluation of these various elements.

The cost associated with the certification of individual producers will clearly depend on the technical specifications included in the code of practice and/or product specifications associated with a particular GI registration. This means that there is probably no standard cost associated with this operation. Some indications have nevertheless been given regarding the potential costs that could be associated with the certification of individual producers in relation with the specific products analysed in the case studies grouped in this book.

The enforcement of the GI implies a regular, probably yearly, inspection of producers in order to make sure that all the producers benefiting from the geographical indication respect its technical specifications and do not develop a 'free-riding' strategy, as mentioned above, which would allow them to benefit from the commercial signal that is attached to the geographical indication without supporting the technical requirements that it entails, thus lowering the quality of the GI product and affecting, in the end, its reputation, that is the value of the intangible asset that the GI protection constitutes.

The cost associated with the inspection of producers will again clearly depend on the number of producers first but also on the technical specifications attached to the GI protection and, more specifically, on the detail, or number, of these specifications as well as on their inherent complexity.

The enforcement of the GI also implies a regular, probably yearly again, inspection of retail outlets selling the product in order to make sure, in this case, that all the products sold under the GI label are effectively produced by one of the certified producers or, in other terms, that no product that is not entitled to bear the GI label is sold on the market while making a fraudulent use of this label. The cost of this inspection will clearly depend on the nature of the product, which can affect the potential for its falsification as well as the complexity of its identification, and on the number of selling points through which the product reaches the consumer.

All these inspections would probably be performed by a GI governance body, that is an association of producers including, most probably, representatives of the state and of local and regional authorities, to which a specific management cost will also be associated.

Finally, individual producers or, most often, the governance body of the GI, could have to support costs of legal actions engaged in order to enforce the respect of the GI label before the courts. Such a procedure could be considered in either of the two cases mentioned above, that is the non-respect by one producer of the GI region of the technical specifications associated with the geographical indication on one hand, or the fraudulent use of the GI label by one producer which is not entitled to use this indication. In the first case, the legal action could aim at the exclusion of the free-riding member from the GI club. In the second, it could aim at the condemnation of the fraudulent user of the label and at the financial compensation of the GI members by this fraudulent user.

The costs associated with such legal procedures clearly depend on the legal system in place in each country and on the complexities of this legal system that could be assessed by the number of possible appeals and the average duration of a legal

procedure at each of these levels. Still, it should be noted that this cost should be borne, in the end, by the offender, who should indemnify the defendants in case, of course, he would be found guilty of the charge put against him, even though the defendants would have to bear the advance payment for these costs.

It should be noted that the costs analysed above will not be incurred by the same entities. Some of them are to be borne by the state or other public entities, such as local or regional authorities. This is the case of the development of a legal framework and of the inspection of producers and retail outlets. Others are to be incurred by individual producers or groupings of producers, groupings that could include, in some cases, some public entities. This is the case of the costs related to certification and of those associated with a possible litigation. Finally, the cost of developing a specific GI would probably, in most instances, be shared by the public and private entities concerned.

Evaluation of costs incurred abroad

As stated above, the costs associated with the registration and the enforcement of a GI are of the same kind in the export markets and in the domestic market. These costs will obviously greatly vary from one country to another and the detailed evaluation of these should thus rely first on the identification of the major export markets of the product considered, that is of the markets on which a protection of its geographical indication would be most important.

The evaluation of these specific costs on each of these major export markets would require a specific study. Still, some data on these costs may be readily available. O'Connor and Company and Insight Consulting (2007) thus provide a comprehensive picture of the various fees detailed above in 160 countries, including 47 African countries.

In conclusion, we have seen that, according to the economic theory, a geographical indication constitutes an intangible asset shared by producers acting on a specific territory in the production of a given and specified good. This asset can appreciate or depreciate over time according to various factors and, in particular, according to the behaviour of its owners, that is the producers of the good benefiting from the GI, as reputation is at the core of this asset.

A geographical indication may induce different kinds of benefit for its owners, notably in the form of a premium price, of a larger market share on the existing markets or of access to new markets. Still, the realization and the extent of these benefits highly depend on key characteristics of the production and market structures. The configuration of the value added chain is also critical to the distribution of these potential benefits between producers, transformers, exporters and distributors.

Besides, the introduction of a GI has a cost; its development could result in a complex and protracted process and the GI may even induce negative effects, in particular on competition and factors prices. It is obviously critical to assess these potential benefits and costs from the very first stages of its development.

This analysis attempts to build on existing theoretical approaches to GIs and to propose a pragmatic methodology for assessing their potential economic impact. This pragmatic methodology can be summed up in eight steps as below:

- 1 *Definition of the product and identification of the value added chain:* The product must be precisely defined in terms of natural and/or know-how characteristics as well as in terms of geographical area. The corresponding value added chain includes all stakeholders in the production and distribution of the product, from the primary producer to the retailer.
- 2 *Quantitative sector analysis:* This consists of an analysis of the composition and structure of the production sector at every stage of the value chain. This analysis is key to understanding the economic power relations that might exist within the value chain. A string of key indicators, as seen above, can be used in this exercise.
- 3 *Individual interviews with all stakeholders:* Based on standard questionnaires, these interviews aim at gathering all the relevant information, both quantitative and qualitative, that might be necessary to fully understand the economic dynamics of the production and distribution sectors.
- 4 *Sector workshop:* A sector workshop should be organized with a view to sharing the information collected and to producing a comprehensive and shared vision about the sector, the conditions of production, the markets and their evolution. Actually, very often, the individual interviews may produce different or even contradictory pieces of information that it is key to reconcile.
- 5 *Exploitation of acquired experience:* Most of the time, a similar product to the one under consideration may already benefit from a GI protection elsewhere in the world. In this case, it is absolutely essential to try to draw lessons from the existing experience through gathering and analysing existing case studies.
- 6 *Analysis of the main export markets:* The development of export markets is very often a key objective of the introduction of a GI protection but the evaluation of the potential impact of this protection on specific markets is often complex and requires to proceed with a full market analysis, including the identification of the Key Success Factors on each of the targeted markets. In addition, a real experience consisting in the introduction of a mention of the geographical origin of a product, without any formal protection of this indication, could be made so as to measure the real reaction of a particular market to this indication.
- 7 *Identification of domestic and foreign costs:* These consist of institutional, organizational and promotional costs. All of them have to be precisely identified and valued so as to balance the potential benefits of a protection with its full cost.
- 8 *Overall assessment and decision:* Based on all the pieces of information previously mentioned, a shared decision should be reached with regard to the introduction of a GI protection. This decision should involve all stakeholders, public and private.

We believe that the systematic performance of an economic assessment based on the implementation of this methodology and on the sharing of the information produced with all stakeholders in the very first steps of a reflection about the introduction of a GI may help producers and countries have the most precise view of the potential benefits and costs that could be associated with the GI and may help maximizing the net profit to both individual producers and the country as a whole that could be reached through this strategy.

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6

GEOGRAPHICAL INDICATIONS, TRADITIONAL KNOWLEDGE, EXPRESSIONS OF CULTURE AND THE PROTECTION OF CULTURAL PRODUCTS IN AFRICA

Michael Blakeney

Introduction

It has been noted that GIs share a number of the characteristics of traditional knowledge (TK) as they both “protect accumulated knowledge typical to a specific locality” (Panizzon 2006: ch.2.1; Blakeney 2009). In its *Review of Existing Intellectual Property Protection of Traditional Knowledge*, the Secretariat of the Inter-governmental Committee (IGC) established by WIPO observed:

Geographical Indications as defined by Article 22.1 of the TRIPS Agreement and appellations of origin, as defined by Article 2 of the Lisbon Agreement ... rely not only on their geographical connotation but also, essentially on human and/or natural factors (which may have generated a given quality, reputation or other characteristic of the good). In practice, human and/or natural factors are the result of traditional, standard techniques which local communities have developed and incorporated into production. Goods designated and differentiated by geographical indications, be they wines, spirits, cheese, handicrafts, watches, silverware and others, are as much expressions of local cultural and community identification as other elements of traditional knowledge can be.

(WIPO/IGC 2002: para 40)

Similarly, the IGC in its consideration of the protection of traditional cultural expressions (TCEs) has defined the subject matter of this protection as:

- (d) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), wooden carvings, sculptures, mouldings, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, food and drink, needlework, textiles, glassware, carpets, costumes, works of mas,

toys, gifts and; handicrafts; musical instruments; stonework, metalwork, spinning and architectural and/or funeral forms

(WIPO/IGC 2004).

A 2004 survey by the Max Planck Institute of the ways in which the existing categories of IP law might be utilized to protect TK (von Lewinski 2004) was generally quite pessimistic about the role that GIs could play in protecting TK. Kur and Knaak observed that:

the indication for a product was the subject matter of this protection, not the product itself. For this reason tradition-based innovations and creations, as indicated in the WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge, cannot enjoy protection per se by means of geographical indications. The protection of geographical indications may apply only to signs indicating these innovations and creations

(Kur and Knaak 2004: 227)

This is unquestionably the case, but all GIs whether ‘Champagne’ wine, ‘Parma’ ham, or ‘Roquefort’ cheese not only protect the use of the indication but also protect the innovations which stand behind the indication. For example, the term ‘Champagne’ protects the name of the product and the ‘méthode champenoise’, the production technology that is linked to the Champagne province of France through the TK of the Champagne producers. This linkage between indication and technological knowledge is identified for example in the 2006 EC Council Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, which in Article 2 defines ‘designation of origin’ to mean:

the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff:

- originating in that region, specific place or country;
- the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and
- the production, processing and preparation of which take place in the defined geographical area.

This relationship between GI and traditional technological knowledge has been recognized by the European Court of Justice (ECJ) in a number of its decisions. In Case C-47/90 *Delhaize v Promalvin*,¹ which concerned *inter alia* the production of Rioja wine, the Court accepted that the particular qualities and characteristics of the wine resulted from a combination of natural and human factors that are linked to its geographical area of origin and that vigilance must be exercised and efforts made in order for them to be maintained. The court accepted that the bottling of wine in the

Rioja region employing a series of complex oenological operations concerning the filtering, clarifying, cooling and other technologies of the region was an important operation, which, if not carried out in accordance with strict requirements, could seriously impair the quality of the product.

Similarly, in Case C-108/0122, the ECJ was concerned with the Italian law for the protection of the designation of origin 'Prosciutto di Parma'. According to that law, the slicing and packaging of Parma ham had to take place at plants in the Parma production area. The House of Lords sought a ruling from the ECJ as to whether the Italian legislation read with Commission Regulation (EC) No 1107/96 and the specification for the protected designation of origin (PDO), Prosciutto di Parma created a valid Community right, directly enforceable in the court of a Member State, to restrain the retail sale as Parma ham of sliced and packaged ham derived from hams duly exported from Parma in compliance with the conditions of the PDO but which have not been thereafter sliced, packaged and labelled in accordance with the specification. The ECJ, applying the 'Rioja' case, ruled that Regulation No 2081/92 must be interpreted as not precluding the use of a PDO from being subject to the condition that operations such as the slicing and packaging of the product take place in the region of production, where such a condition was laid down in the specification. The Court noted that the slicing and packaging of Parma ham constituted important operations which may harm the quality and hence the reputation of the PDO if they were carried out in conditions that result in a product not possessing the organoleptic qualities expected. The Court commented that those operations might also compromise the guarantee of the product's authenticity, because they necessarily involve removal of the mark of origin of the whole hams used. Consequently, the Court ruled that the condition of slicing and packaging in the region of production, whose aim was to preserve the reputation of Parma ham by strengthening control over its particular characteristics and its quality, could be regarded as justified as a measure protecting the PDO and was of decisive importance to producers. In other words, the decisions of the ECJ suggest that in Europe, a GI is a 'shorthand' expression, both for the geographical origin of a product and the traditional technology, which stands behind a GI, in much the same way as a trademark is a shorthand reference to the quality of a product.

Kur and Knaak also reject the possibility that 'Kava' from the Pacific region and 'Rooibos' from South Africa could be protected as 'they are not GIs per se as they have no direct geographical meaning' (Kur and Knaak 2004: 228). This interpretation appears to overlook the jurisprudence on indirect GIs. For example, the ECJ held 'Feta' to be a GI for cheese coming from Greece, even though there is no geographical place of that name and the UK Commission on Intellectual Property Rights (2002: 89) suggested that 'Basmati' might be registered as a GI to protect rice from India/Pakistan.

Kur and Knaak are also pessimistic about the general prohibition in Article 22 of the TRIPS Agreement of the use of misleading GIs being of much assistance for the protection of TK. They explain that:

As to geographical indications of indigenous communities, the general provisions of the TRIPS Agreement are clearly not sufficient to offer adequate protection.

The general protection pursuant to the TRIPS Agreement is too limited in its scope because it depends on the opinions of the public in the country where protection is claimed. Under this rule geographical indications of indigenous communities being unknown as such to the public of certain countries are unprotected in those countries.

(Kur and Knaak 2004: 223–4)

This assessment makes some assumptions about the ignorance of persons about indigenous communities, although the growth of ‘ethno-marketing’ suggests that there is an increasing awareness of indigenous communities and what they have to offer. However, as Kur and Knaak concede, this particular problem can be overcome by the establishment of a register for GIs.

Three examples provided by the IGC Secretariat of traditional knowledge protected by GI are ‘Cocuy ... [de]Pecaya’ liquor (from Venezuela), and ‘Phu Quoc’ fish sauce and ‘Shan Tuyet Moc Chau’ tea (both from Vietnam) (WIPO/IGC 2002: para 13).

Negotiations for an international regime to protect TK and TCEs

Introduction

The origins of the consideration of TK and TCEs as an IP issue can probably be traced to the early debates that questioned the relevance of the international copyright regime for developing countries. The Stockholm Conference for the Revision of the Berne Convention, which was convened in June 1967, witnessed the first significant agitation from developing countries for an acknowledgement of their particular circumstances. In the preparations for the Stockholm Conference, it was proposed that the concerns of developing countries could be accommodated in a separate protocol. It was envisaged that this protocol would include measures for the protection of folklore. Although a Protocol was grudgingly adopted by the final plenary session of the Stockholm Conference, it did not come into force as it failed to secure the requisite number of ratifications (Ricketson 1987: 607–20). The failure of developing countries to secure an effective protection of folklore within WIPO led to initiatives undertaken within other international organizations. This has become a characteristic of contemporary developments where parallel international IP negotiations are undertaken on the same subjects simultaneously in WIPO, WTO and UNESCO.

In April 1973, the Government of Bolivia had sent a memorandum to the Director-General of United Nations Educational, Scientific and Cultural Organization (UNESCO) requesting that the organization examine the opportunity of drafting an international instrument on the protection of indigenous creative works in the form of a protocol to be attached to the Universal Copyright Convention, which is administered by UNESCO. Following that request, a study was prepared in 1975 by the Secretariat of UNESCO on the desirability of providing for the protection of the cultural expressions of indigenous peoples on an international scale. Because of a perception of the broad scope of this analysis, in 1977 the Director-General of UNESCO

convened a Committee of Experts on the Legal Protection of Folklore, which, in a report that same year, concluded that the subject required sociological, psychological, ethnological, politico-historical studies 'on an interdisciplinary basis within the framework of an overall and integrated approach' (UNESCO 1977). Pursuant to a resolution adopted by the General Conference of UNESCO in Belgrade in September–October 1980 and a decision taken by the Governing Bodies of WIPO in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened. After a series of meetings, the Committee formulated Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Action, which were adopted by the two organizations in 1985.

It should be noted that the first discussions about the possibility of the protection of the creativity of indigenous and traditional communities occurred within the context of 'folklore' and this was considered to be in the area of copyright law. The first major discussion of the protection of TK, as such, occurred in the context of the joint UNESCO/WIPO World Forum on the Protection of Folklore which was convened in Phuket in April 1997. This Forum was principally concerned with the adequacy of copyright law to protect folkloric works, such as paintings, sculptures, drama, music and magic. At the Forum, the term 'folklore' was criticized as being inappropriate. For example, the Ghanaian delegate, Betty Mould-Iddrisu, in a paper on the African Experience of the preservation and conservation of expressions of folklore, observed that the Western conception of folklore tended to focus on artistic, literary and performing works, whereas in Africa it was much more broad, encompassing all aspects of cultural heritage (Mould-Iddrisu 1997: 3).

It should be noted in this regard that a number of the countries surveyed in this book specifically refer to the protection of 'folklore' in their copyright laws. Thus the Nigerian Copyright Law defines folklore as: 'A group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.'² Identical definitions can be found in the laws of the Republic of Cameroon³ and Senegal,⁴ as well as Congo, Burundi, Mali and the Central African Republic (see Kuruk 1999: 778). The Ghanaian Copyright Law defined folklore as 'all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore'.⁵

WIPO Inter-Governmental Committee (IGC)

At the 2000 WIPO General Assembly, the member states agreed on the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Three interrelated themes were identified to inform the deliberations of the Committee: IP issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional

knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore (WIPO 2000).

At the First Session of the IGC, held in Geneva from 30 April to 3 May 2001, the member states determined the agenda of items on which work should proceed and prioritized certain tasks for the Committee. Principal among these was ‘the development of “guide contractual practices”, guidelines, and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing’.⁶ This soft law approach to the protection of TK continued for a number of years. In August 2004 the IGC began to consider the ‘objectives’ and ‘principles’ that should animate the protection of TK and TCEs⁷ and this task has continued through all the subsequent sessions of the IGC.⁸

For the guidance of the tenth session of the IGC (30 November to 8 December 2006) the Secretariat identified some 16-policy objectives that ought to underpin the legislative protection of TK.⁹ There is a good deal of overlap between these various objectives, but in a number of them can be perceived a role for GIs in TK protection. The first objective identified by the IGC Secretariat is to ‘Recognize value’.

This is defined as follows:

- (i) recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems.¹⁰

This objective recognizes the economic and commercial value of TK and that it might function as a framework for the creative life of indigenous and local communities.

The second group of policy objectives identified by the IGC Secretariat concerns the promotion of respect for TK systems and for meeting the needs of TK holders. Included in the promotion of respect is a concern:

... for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology.¹¹

Guided by ‘the aspirations and expectations expressed directly by traditional knowledge holders’, the IGC Secretariat refers to the necessity to ‘respect their rights as holders and custodians of traditional knowledge ... and reward the contribution made by them to their communities and to the progress of science and socially beneficial technology’.¹²

The central cluster of policy objectives identified by the IGC Secretariat refer to the importance of promoting the conservation and preservation of TK and protecting it from misappropriation through ensuring prior informed consent for access to genetic resources, and the promotion of equitable benefit sharing. Relevant to the issue of GIs is objective (x), which urges the promotion of innovation and creativity in the following terms:

- (x) encourage, reward and protect tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and traditional communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge.¹³

In this regard, as Panizzon and Cottier (2005: 227) observe: ‘TK is associated with “niche” rather than with “mass” production. It therefore fosters diversity and contributes to the preservation of natural resources.’

A number of the policy objectives of TK legislation enumerated by the IGC Secretariat concern the preservation and development of TK systems¹⁴ and to the safeguarding of TK ‘for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general’.¹⁵

The 17th session of the IGC of 6–10 December 2010 was identified as the occasion for the first text-based discussion of the establishment of international TK and TCEs regimes. A Working Group met from 19 to 23 July 2010 to prepare draft articles on TCEs. These were discussed at the 17th, 18th and 19th sessions of the IGC held between December 2010 and July 2011. The 2011 mandate of the IGC was ‘to submit the text (or texts) of an international legal instrument (or instruments) which will ensure the protection of GRs, TK and TCEs, to the WIPO General Assembly in September 2011’.¹⁶ The General Assembly will then decide on convening a Diplomatic Conference.

Other international initiatives for the protection of TK

The role of traditional communities in conserving genetic resources through the perpetuation of their TK, as well as their entitlement to the sharing of benefits from the exploitation of those resources, is acknowledged in a number of international instruments. The International Treaty for the Protection of Plant Genetic Resources for Food and Agriculture acknowledges Farmer’s Rights in the following terms:

- 9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

Similarly, the Convention on Biological Diversity establishes the principle of equitable benefit sharing when conserved biological resources are exploited (see Blakeney 2002). An illustration of the contribution that traditional communities have made in the conservation of biological resources has been revealed in some biopiracy controversies, some involving African biological resources. For example, blight resistant rice, *Oryza longistaminata*, conserved by Malian farmers was the subject of patent claims by the University of California at Davis (see WIPO/UNEP 2007).

A similar controversy erupted in 2000 over the patenting of the Hoodia cactus (*Hoodia gordonii*), which is eaten by the San People of the Kalahari Desert as an appetite suppressant. The patent was obtained in 1996 by Council of Scientific and Industrial Research (CSIR) over the appetite-suppressing element (P57) of Hoodia. In 1997, CSIR granted an exclusive world licence of the patent to Phytopharm that in 1998 sublicensed Pfizer to develop and market P57 as an appetite suppressant pharmaceutical, a potential slimming drug and cure for obesity. The GIs implications of this case come from the commercial appeal of marketing this product as a Hoodia extract, in other words, from focussing upon its 'natural' origin and its derivation from the territory of the San (see Wynberg, Schroeder and Chennells 2009). A concern for the authentication of traditional culture in the face of the economic, psychological and cultural threat from alien sources is often cited as a reason for the protection of TK (Jabbour 1982; Blakeney 2000). Directly relevant to GIs is objective (xiii) which recommends the promotion of 'community development and legitimate trading activities' in the following terms:

- (xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries, where traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development.

The protection of TK is urged by the policy objectives listed by the IGC Secretariat dealing with the repression of unfair and inequitable uses¹⁷ and precluding the grant of improper IP rights to unauthorized parties.¹⁸ The enforcement of GIs is a more practical way for traditional communities to secure their rights, as the expense of enforcement will be carried either by the producers' consortium or by the administrator of the GIs system.

Regional initiatives

The slow pace of the international negotiations on TCEs, as well as on TK and genetic resources, had caused the Anglophone African countries at a diplomatic conference on 9–10 August 2010 in Swakopmund, Namibia, organized by the African

Regional Intellectual Property Organization (ARIPO), to promulgate a Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. The Protocol is meant to 'protect creations derived from the exploitation of traditional knowledge in ARIPO member states against misappropriation and illicit use through bio-piracy'.¹⁹

The purpose of this Protocol is described in section 1.1 as being:

- (a) to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol; and
- (b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.

The very diverse holistic conceptions of traditional knowledge and cultural and artistic expressions in the traditional context are acknowledged in section 1.3 and their dynamic and evolving nature are acknowledged in section 1.3. 'Expressions of folklore' are defined in section 2 as 'any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested' and include tangible expressions, such as 'productions of art, in particular, drawings, designs, paintings ..., carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts, musical instruments; and architectural forms'. As will be seen below, a number of tangible expressions of African folklore could be protected as GIs.

Further particulars of the 'protection criteria for expressions of folklore' are contained in section 16. This extends protection to expressions of folklore, 'whatever the mode or form of their expression', which are:

- (a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and
- (b) characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.

The beneficiaries of protection of expressions of folklore are defined in section 18 as the local and traditional communities:

- (a) to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities; and
- (b) who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.

Section 19 provides that expressions of folklore shall be protected against all acts of misappropriation, misuse and unlawful exploitation.

The Swakopmund Protocol was used as a model by Fiji, Papua New Guinea, Solomon Islands and Vanuatu in establishing a Treaty for the reciprocal recognition of TK and expressions of culture (Blakeney 2011).

African cultural products

It is pointed out that trade in cultural products can contribute to the quality of life in the places they are produced, and can enhance the image and prestige of the local area, as well as playing an important role in community food security, nutrition and health, particularly among 'poorer households, women and disadvantaged groups' (Maonera 2006). Maonera (2007: 9) suggests that poverty in rural areas can be combated by 'diversified, non-agricultural rural development activities especially those that focus on cultural products'. He points out that most cultural products are often associated with traditional uses that are not widely known and are often only linked to the problem of poverty and subsistence.

In 2006 the Department of Trade and Industry of the African Union (AU) issued an Advocacy Statement on 'The Promotion and Protection of Africa's Cultural Products'²⁰ expressing its concern about the increasing incidence of African cultural products being made in other parts of the world 'without deference to the African originators'.²¹ The AU Statement referred to the misappropriation of African textile designs. African textile art is represented by Ashanti strip weaving, Ghanaian Kente cloth, the bark cloth of the Mubuti of the Congo, baule cloth of Côte d'Ivoire, Hausa textile of Niger, Khanga cloth of East Africa and the Kuba raffia cloth embroideries of the Congo.

Kente cloth

The possibility of protecting African textile designs is explored below by reference to the Kente cloth by the Akan people (including the Asante, Bono, Fante and Nzema) of Ghana and the Côte d'Ivoire.²² Kente is identified by its dazzling, multi-coloured patterns of geometric shapes and bold designs. Each Kente pattern is associated with a particular concept. For example, the Obaakofoo Mmu Man pattern symbolizes democratic rule; Emaa Da, novel creativity and knowledge from experience; and SikaFreMogya, responsibility to share monetary success with one's relations.

Although Kente was developed in the 17th century by the Ashanti people²³ it has its roots in a long tradition of weaving in Africa dating back to about 3000 BC.²⁴ Kente is used both for its aesthetic and symbolic significance. There are more than 300 different types of cloth designs, each with its own name. Each cloth design comes with numerous variations in colour and distribution of motifs. Colour symbolism within the Akan culture affects the aesthetics of Kente. Colours are chosen for both their visual effect and their symbolic meanings. A weaver's choice of colours for both weft and warp designs may be dictated either by tradition or by individual aesthetic taste. There are gender differences in colour preferences, dictated by tradition, individual aesthetic taste and by spirit of the occasion. In its cultural context, Kente is a visual representation of history, philosophy, ethics, oral literature, religious belief, social values and political thought. Originally, its use was reserved for royalty and limited to special social and sacred functions. It may be used as a special gift item during ceremonies such as child naming, puberty, graduation, marriage and soul-washing. It may also be used as a symbol of respect for the departed souls during burial rites and ancestral remembrance ceremonies.

Yarns for weaving come in a variety of forms and qualities. In the past, yarns were either spun from locally grown cotton or unravelled from cotton and silk cloths imported from Europe and Asia. Today, factory-made cotton, silk or spun rayon yarns are obtained from factories in and outside Ghana. Various colours of yarns may be combined in particular ways to reflect the symbolic significance of the cloth. Quality of yarns used in weaving a particular cloth reflects on the level of prestige associated with the cloth. Silk yarns are usually considered the most prestigious and are therefore the most highly valued. Silk cloth, in the past was reserved for royalty and the wealthy. An average width of a strip is four inches. Several strips are carefully arranged and hand-sewn together (some weavers use sewing machines in recent times) to obtain a desired size. Tradition has it that Kente is woven mainly by men. Women, in the past, played a significant role by spinning raw cotton into yarns, dyeing yarns into desired colours, sewing strips together to form large cloths and assisting in the marketing of the cloths. Today, factory spun yarns have replaced hand-spun yarns, and therefore, the woman's role is mainly in the area of sewing strips together and marketing the cloth.

The production of Kente is labour intensive (typical sole entrepreneurship-firms employing between 5–20 persons with approximately 100,000 persons deriving livelihood from this commodity chain process). Trade peaked at \$US14 million in 2001. This has since fallen to \$US3 million, attributed to the rise of synthetic versions from China and Vietnam that retails in the export markets in Germany, UK, and the rest of the EU and US at an average price of \$US3.5 compared with Ghana's \$US9. This identifies a potential role for GIs in protecting Kente cloth.

Handicrafts

Kisii soapstone

A number of Kenyan handicrafts have attracted an international reputation that could be protected by GIs. Handicrafts produced from Kisii soapstone have a long tradition. Kisii soapstone is found in an area of around 10km² in two districts of Nyanza Province around 400km from Nairobi. The name refers to a geographical area. Handicrafts made with this stone have a typical style. Some of the sculptures and other artworks have received international recognition (for example, one sculpture was commissioned for the UN Building in New York). Around 90 per cent of the production is exported, mainly to the EU, US, Japan, China, New Zealand and Australia (mostly in form of handicrafts). There is a local association of soapstone producers, Kisii Soapstone Carvers Cooperative Society Ltd (KISCO-cop), reportedly with 100 female and 300 male producers. Soapstone processing seems to be the main source of revenues in that geographical region. A feasibility study conducted under a Swiss-Kenya GIs project concluded that protecting Kisii soapstone handicrafts under a GI would be an interesting pilot case.

Wamunyu handicrafts

The Wamunyu (Mackakos) region about 200km southeast of Nairobi is reputed for its wooden handicrafts. The name derives from the Wamunyu River. Wamunyu

handicrafts have a typical style and are exported to a number of countries, mainly in Asia. Products are linked to the geographical area and not to individual artists. They are also sold within the country by traders, including in luxury boutiques and as souvenirs at the airport. Sales prices in Nairobi are already 2–3 times higher than in Wamunyu. The use of GIs such as ‘Wamunyu handicrafts’, which is already used in the market, could help local producers to create higher value for their products.

Kiondo

‘Kiondo’ is a handbag made from Kenyan sisal. The bags have been made for a number of generations by the Kikuyu (mainly from the southern and western sides of the Mount Kenya) and Kamba (based in the Eastern Province of Kenya). Although the origins of Kiondo are not precisely known, it has been produced by those ethnic groups over several generations (see Joseph 2000). Traditionally, kiondos were used to hold staple foods, such as beans and maize. Now they have evolved into fashion bags, sold in local and regional markets as well as, to some limited extent, in international markets especially through websites selling African products.²⁵ The main challenge identified in protecting this product under a GI is the lack of an organization of a producer group that could develop a GI. There is a current campaign for the inclusion of Kiondo in the UNESCO World Heritage list of cultural items.²⁶

Zanzibar doors

During the case study on cloves, discussed above, a number of informants suggested that the distinctive doors which can be found on houses in the Stonetown district of Zanzibar City, a UNESCO World Heritage site, could be protected as a GI. These wooden doors are a fusion of Swahili, Omani and Indian styles (see Mwalim and Raw 1998). Internet searches indicate that there is a significant international trade in these doors. For example one Russian site indicates that: ‘We can export our Zanzibar Door to Canada, Brazil, Denmark, Australia, Tunisia, Jordan, Latvia.’²⁷

Conclusion

Obviously, the most focussed protection for cultural products would be through the international adoption of a mandatory *sui generis* system to protect TCEs and TK. However, in the absence of this, other categories of intellectual property protection have to be deployed. While most of the discussion to date has focussed upon the role which patent and PVP laws might play in the protection of TK, the objectives of GIs protection share a number of policy objectives both with TK and TCEs protection. Each system of protection seeks to preserve communal rights. GIs are a collective right owned by all producers in a geographical region who observe the specified codes for production in that region. GIs have been described as a means of ‘enabling people to translate their long-standing, collective, and patrimonial knowledge into livelihood and income’ (Bérard and Marchenay 1996: 240), which has been identified as one of the core objectives of TK and TCEs protection.

GIs can be held in perpetuity, for as long as a community maintains the practices that guarantee the distinctive quality of a local product. This overcomes the limited terms of protection conferred by other forms of IP protection.

At all times it should be noted that GIs laws protect only the designations associated with products. Indeed, IP laws seldom protect knowledge as such. The exceptions to this are trade secrets law and patent law. However, empowering a local community or individual holder of TK and TCEs with the possibility to exclude third parties from the unauthorized use of designations of its culture would better balance the sharing of benefits from the utilization of those expressions of culture and would also ensure that any exploitation would be in a way which recognized, where appropriate, the sacred beliefs and practices of traditional peoples

Finally, the extension of the scope of registered GIs protection under TRIPS would also provide an example for developing countries of the practical utility of an international IP regime and a partial justification for the implementation of the TRIPS Agreement.

Notes

- 1 *tablissements Delhaize Frères et Compagnie 'Le Lion' SA v Promalvin SA*, Case No. C-47/90 [1992]ECR I-3669.2. See, for example, Stilwell and Monagle (2000).
- 2 Copyright Decree (Nigeria) § 28(5) (19 December 1988), reprinted in (1988) 25 WIPO, *Copyright: Monthly Rev.*, Nigeria, text 1-01, 1, 8.
- 3 Law No. 82-18 to Regulate Copyright (Cameroon) § 4(viii) (26 November 1982), reprinted in (1982) 19 WIPO, *Copyright: Monthly Rev.* at 360, 360–61.
- 4 Law on the Protection of Copyright (Senegal) article 9 (Dec. 4, 1973), reprinted in (1974) 10 WIPO, *Copyright: Monthly Rev.* 211, 212–13.
- 5 Copyright Law (Ghana) § 53 (21 March 1985), reprinted in 21 WIPO, *Copyright: Monthly Rev.* 423, 435 (1985).
- 6 See WIPO Doc, WIPO/GRTKF/IC/2/3, 10 September 2001, para 1.
- 7 See WIPO Doc WIPO/GRTKF/IC/7/5, 20 August 2004.
- 8 The most recent contribution in this regard is a document of 7 June 2010 on the 'Protection of Traditional Cultural Expressions/Cultural expressions of Folklore. Revised Objectives and Principles', which was prepared for the 17th meeting of the IGC in December 2010, WIPO/GRTKF/IC/17/4Prov.
- 9 WIPO ICIPGR TKF, 'The Protection of Traditional Knowledge: Draft Objectives and Principles' (Document prepared by the Secretariat) WIPO/GRTKF/IC/10/5, 2 October 2006, Annex: 3–5.
- 10 WIPO/GRTKF/IC/10/5, Annex: 33 objective (i).
- 11 WIPO/GRTKF/IC/10/5, Annex: 3 objective (ii).
- 12 WIPO/GRTKF/IC/10/5, Annex: 3 objective (iii).
- 13 WIPO/GRTKF/IC/10/5, Annex: 4 objective (x).
- 14 For example, WIPO/GRTKF/IC/10/5, Annex 3: 3–4 objective (vi).
- 15 WIPO/GRTKF/IC/10/5, Annex: 4 objective (vii).
- 16 WIPO Doc, WO/GA/40/7, 12 August 2011.
- 17 WIPO/GRTKF/IC/10/5, Annex: 4 objective (xiii).
- 18 WIPO/GRTKF/IC/10/5, Annex: 3, 4–5 objective (xiv).
- 19 See www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=294.
- 20 See www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/0DD2D9DE-E737-4839-B5F1-11F4B3B53102_Cultural_products_protection_advocacy_statement_2.pdf.
- 21 Ibid.: 2.

- 22 Derived from: MCDXLIV, 'A Part of Culture More than a Piece of Fabric' <http://before1444.com/news/a-part-of-culture-more-than-a-piece-of-fabric/>, 8 August 2011, and <http://kente.midwesttradegroup.com/history.html>.
- 23 The origin of Kente is explained with both a legend and historical accounts. A legend has it that a man named Ota Karaban and his friend Kwaku Ameyaw from the town of Bonwire (now the leading Kente weaving centre in Ashanti) learned the art of weaving by observing a spider weaving its web. Taking a cue from the spider, they wove a strip of raffia fabric and later improved upon their skill. They reported their discovery to their chief Nana Bobie, who in turn reported it to the Asantehene (the Ashanti chief) at that time. The Asante then adopted it as a royal cloth and encouraged its development as a cloth of prestige reserved for special occasions. Ibid.
- 24 Historical accounts trace the origin of Kente weaving to early weaving traditions in ancient West African Kingdoms that flourished between 300 and 1600 AD. Some historians maintain that Kente is an outgrowth of various weaving traditions that existed in West Africa prior to the formation of the Ashanti Kingdom in the 17th century. Archaeological research has dated examples of narrow-strip cloths woven in West Africa as early as the 11th century AD.
- 25 See www.tradekey.com/ks-african-kiondo-bag and www.ukumbini.com/Hand-Bags-Kiondo-3.htm.
- 26 See <http://ip-kenya.blogspot.com/2008/02/should-kenya-petition-unesco-for-kiondo.html>
- 27 www.openrussia.ru/catalogitems/3947/Zanzibar-Door.htm.

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Part II

Case Studies

7

CAMEROON: OKU WHITE HONEY

Thierry Coulet in collaboration with Marcelin Tonye Mahop

Introduction

For Cameroon, as for most member states of the OAPI, the legal framework for the protection of geographical indication is laid out in Annex VI of the 1999 Revised Bangui Agreement establishing an African Organization of Intellectual Property. Although Annex VI of the revised Bangui agreement is seen as accommodating a comprehensive approach in the protection of GI, there are no implementing tools that can aid its implementation at the national level. These tools may take the form of guidelines or codes of conduct for prospective applicants in pursuit of protection of eligible products as GI throughout the OAPI jurisdiction. Perhaps the newly created National Committee on Geographical Indications could eventually be tasked with the development of a specific legal framework for Cameroon. It is worth noting that natural products may actually be granted protection of geographical indication under the Bangui Agreement, which is not the case in other legal systems.

The OAPI works through national liaison structures of its member states. In this respect, the first step in an attempt to explore a practical approach in identifying, selecting and moving towards effective protection of selected products should be carried jointly by the organization and the national liaison structures. The national liaison structure representing Cameroon is the Directorate of Technology Development and Intellectual Property of the Ministry of Industry, Mines and Technological Development.

For more than ten years, the OAPI has been engaged in an endeavour of actively promoting geographical indication protection within its 16 member states, and has ambitious goals in this area. This endeavour is evidenced through the conduct of a pilot study, aiming to identify eligible products for protection within its member states. According to some of the historical reviews on the progress made by OAPI

regarding the protection of geographical indications, including one review by the current director general of OAPI, four countries were involved in this pilot project that commenced in 2000, namely the Republic of Burkina Faso, Cameroon, the Republic of Côte d'Ivoire and the Republic of Guinea (Edou 2008). Nine products from these four countries were initially identified as potentially eligible for protection as GI.¹ Surprisingly, and perhaps because this phase of the project was not carried out comprehensively, Oku White Honey was not among the products initially identified from Cameroon. After this initial phase, OAPI was awarded further funds by the France Development Agency, which is thought to have expanded efforts not only to identify further products, but to engage in a proper process leading to actual protection of the most promising products. The Oku White Honey and a second product, Penja White Pepper, emerged as the most promising and are likely to be the first OAPI member states originated products to benefit from GI protection under Annex VI of the 1999 Revised Bangui Agreement.

According to the OAPI Director General, Edou Edou, the implementation of geographical indication protection in OAPI member states is now entering the operational phase. As a result, one of the two Cameroon products identified, namely Oku White Honey and Penja White Pepper should be awarded GI protection within 2011. Specifications are being developed for both products by a National Committee consisting of competent national authorities and representatives of the producers concerned. This Committee is tasked in a broader sense with the development of the institutional and legal framework for geographical indication protection of the products.

The establishment of this National Committee in charge of developing the specifications was followed by a first phase of systematic identification of the products potentially eligible for GI protection. Thereafter, there was a profiling or selection based on a set of criteria that were then applied in evaluating the feasibility and economic interest of protection. The National Committee established in Cameroon in December 2010² will be supported in the development of specifications of the Oku White Honey by various local consultants, as well as by CIRAD.³

The entire process, from identification to registration of geographical indication protection, will extend over a period of approximately four years. In most cases, if not all, the process is inherently confrontational owing to the need for actors reaching settlement on potentially tricky issues including: the delimitation of the area of production of the GI (Oku Honey in this case) and the drawing of technical clauses of the specifications. These are very important but complex issues that need tackling in a comprehensive manner during the process in order to ensure that the interests, financial and infrastructural concerns of most, if not all, actors including small producers are taken into account for in the prospective GI. More specifically, elements such as identification of products and stakeholders, producers, distributors and intermediaries active in the sector, wholesalers for instance, will be included within these specifications. Once the specifications have been officially adopted, and the selected products registered with the OAPI, there will obviously be a need to set up a monitoring system to ensure compliance. This system shall be established, managed and, of course, financed by the respective OAPI member states concerned. Promoting

Geographical Indications Protection by the OAPI includes promoting the product on the export markets, through participation of the OAPI in various trade fairs hosted in the products' major importing countries.

The mere concept of geographical indication is very new to beekeepers and Oku White Honey producers in the Cameroon northwest region in general; the situation is similar within the Oku honey cooperative specifically, despite OAPI efforts to raise producers' awareness on the issue of geographical indications protection through the organization of meetings and seminars. Nonetheless, despite several meetings with experts of the OAPI and though the geographical indication protection process for Oku White Honey has been officially launched, producers are still inquiring about the impact of this protection in their daily activity, especially regarding the possible impact on their income.

At this stage, many stakeholders are involved in the process leading to the protection of Oku White Honey as a geographical indication: producer groups,⁴ cooperatives, individual beekeepers, the Government of Cameroon through its Ministry of Agriculture and the Ministry of Trade and Industry, international development organizations, various international development agencies such as SNV (Netherlands Development Organization) or AFD (French Development Agency), and the OAPI.

It should be noted that beekeepers, and in particular ANCO, an NGO that is one of the main cooperatives in Bamenda actively involved in the Oku White Honey GI process, are very positive towards the prospect of GI protection for Oku White Honey. However, very few stakeholders actually have a clear image of what geographical indication is, not to mention what its impact may be on their everyday activities.

Oku White Honey: Natural properties and know-how related to its production

The main qualities of Oku White Honey, apart from its distinctive colour, are its taste and a particular softness. This honey is particularly suitable for long-term preservation and does not crystallize. According to our interlocutors, the distinct features of colour and taste could be a result of the local vegetation in the area of its production.

The production of honey in the Northwest region of Cameroon, Oku White Honey in particular, and consequently its availability on the market is a seasonal activity, which reaches its annual peak around the month of June. However, if the production and availability of honey is pronounced in this particular month, conservation strategies of honey producing groups mean that, from a practical perspective, it is highly unlikely to lack honey on the market at any time of the year.

Natural properties of Oku White Honey, related to geographical origin

Oku White Honey has a strong geographical identity, as it is produced exclusively in the Northwest region of Cameroon. Oku is a village located in the Northwest region

of Cameroon, about 100km from the town of Bamenda, the capital of the region. Within the framework of the ongoing process pertaining to the protection of Oku White Honey as GI, the specific production area of Oku White Honey which is being packaged in the technical specifications of the product is currently under delineation. Nonetheless, information on the area of production exists both in the literature and as provided by honey producers in the Northwest region during the recent fieldwork carried out there. There is no anthropological evidence for this affirmation, but most honey producers met during recent fieldwork in the region suggested that the production of the white honey originated from Oku, one of the villages on the Kilum slope of the Kilum-Ijim mountain forest area. This activity rapidly spread to other villages in the region. Furthermore, a 2009 study by Bernard Bridier and Didier Chabrol indicates that the 20,000ha forest area of Kilum-Ijim mountainous forest potentially represents the area of production of the white honey, with the implication that most villages in the area, including Oku, Belo, Jakiri, Njinikom and Fundong, are involved in the production of white honey as an income generating activity (Bridier and Chabrol 2010).

The specificity of Oku White Honey is attributed to the climate and the vegetation of this region. Kilum-Ijim is a mountainous forest area in the northwest region of Cameroon, which has already benefited from biodiversity conservation projects managed by a number of organizations including Birdlife International.⁵ The entire mountainous forest area being in altitude is characterized by a particularly cold climate and very distinctive vegetation. These two elements are the keys determinants for the specific characteristics of the white honey, especially its colour and its suitability for long term preservation. Of marked relevance to the production of the white honey is the vegetation of Kilum-Ijim forest, which is reported to host the specific trees from which the pollen used for production of the white honey is thought to derive, including but not limited to a tree species called *Schefflera abyssinica* (see Bridier, B. and Chabrol D. 2010).⁶

Beekeeping, white honey production and local expertise

The production of Oku White Honey derives from the specific know-how of beekeepers in these villages regarding beehive construction, mounting and placement in specific locations in the forest. The hives for production of white honey are mounted in specific locations, so as to be colonized by bees pollinating very targeted vegetation. This specific know-how, which beekeepers of most of Kilum-Ijim villages master very well, suggests that beekeepers know when and where to place their beehives, so that they can be colonized by the bees that extract the pollen of the specific trees.⁷ Beekeepers know exactly where to place their hives in terms of altitude, which periods and seasons of the year are best to place and develop their hives in the forest, and where precisely to mount their hives so that they are colonized by bees that will most likely use pollen allowing the production of white honey.

Apart from the aspects indicated above in respect of, for instance, targeting sites to place beehives and the period for such placement so that the relevant pollen is the one that is used by bees, honey producers indicate that, by and large, the rest of the white honey production process is in itself identical to the production of ordinary

honey. Depending on the type of hives to be used by the beekeeper (traditional or Kenyan-type beehive), beehive construction is the same whether it is for the production of white or ordinary honey. Likewise, similar techniques are largely applied for collection, extraction and refinement of honey, be it white or ordinary. Once the honey is collected and refined, it is sold to a cooperative through a producer group, packaged in turn by the cooperative and finally sold to the end users, mostly through cooperative-owned stores in Bamenda.

In general, the cooperative collects honey from producer groups once it is extracted and refined. Tests are carried out and a second refining is undertaken by the cooperative, to remove foreign particles and any possible presence of mould before bottling the honey and packing it for commercialization under the trade name of the cooperative.

Identification of the geographical area of production

During a meeting held in Bamenda in January 2011 regarding the implementation of geographical indication protection of Oku White Honey, the main issue that emerged concerned the specific designation to be officially attributed to the protected GI. This meeting, actually initiating the process for geographical indication protection of Oku White Honey, was organized by the OAPI and other partners such as SNV, AFD and various cooperatives also attended.

The issue with the appellation of the GI in connection of the white honey emerged when participants at the launching meeting who represented the villages from the Ijim slope of the mountain forest area raised the fact that white honey is not only produced in Oku. Farmers in their villages are also involved in white honey production; on this basis they argued that the designation of the product as 'Oku' White Honey would not reflect the broad area of production of white honey in the Northwest region, specifically the Kilum-Ijim Mountain forest area. However, after lengthy discussions, two trends emerged as to the naming of the white honey protected GI. The first trend suggested that the name that should be associated with the white honey for the GI protection purpose is: 'Oku White Honey'. Most participants agreed on this option. The second trend suggested the use of a composite name, using 'Oku White Honey' at its core. This trend was based on the recognition of the fact that the production of white honey started from Oku and spread across the other villages of the Kilum-Ijim forest area. Furthermore, there was broad recognition that white honey from Cameroon is known beyond the country borders as 'Oku' White Honey, meaning that the 'Oku' origin is a selling point in national and international markets. In addition, despite the existence of functioning honey cooperatives across the Northwest region of Cameroon, and in particular in all of the villages across the Kilum-Ijim forest area, larger and well organized producer groups and cooperatives are based in Oku. On this basis, the second trend was inclined on the naming: 'Oku White Honey', followed by the words 'product of', and the precise name of the village of production, such as 'Ijim'. It is not clear what name has finally been adopted in the technical specifications, the drawing-up of which seems to have recently been completed by experts and stakeholders involved in the Oku White Honey GI process.

Reputation of Oku White Honey

Internationally, the product has not yet clearly established a reputation. However, at the national level in Cameroon, there appears to be a very well established reputation of the white honey, which is strongly linked to its medicinal properties.

Currently, cooperatives are commercializing the honey collected using their respective names on the labels, although there is a broader trend followed by cooperatives in the Northwest region to use the more general origin as 'Cameroon Highlands' on the labels. When a broader origin 'Cameroon Highlands' is used on the label, the cooperative selling the honey generally adds its name on the label.

Oku White Honey value chain analysis

Despite the existence of many honey cooperatives and producer groups in the Northwest region of Cameroon, some active producers in the production area work in isolation as they do not belong to any cooperative. These are individual producers, with no employees and who do not for instance belong to any of the two large cooperatives described below. Nonetheless, by and large, most honey producers are organized in Common Initiative Groups (CIG) which are in turn federated into larger cooperatives such as ANCO and HONCO. For those individual producers who are not affiliated with organized groups such as CIGs and cooperatives, the production of white honey is most often a secondary activity, their principal activity being in another agricultural or commercial trade.

Sector organizations

Currently, there are more than ten cooperatives active in the production and commercialization of Oku White Honey. Therefore, there is no single organization bringing together all producers. Some individual producers do not even belong to a cooperative. As far as NGOs are concerned, the Apiculture and Nature Conservation Organization (ANCO) is active in the Northwest region and in particular in the Bamenda area. This NGO aims to combine beekeeping, honey production and biodiversity conservation, thus supporting sustainable beekeeping, biodiversity protection and the fight against poverty. ANCO brings together more than 6,000 producers, all of whom are members of smaller producer groups organized as Common Initiative Groups (CIGs). The key criterion for eligibility of a CIG to become a member of ANCO is that it must comprise at least ten members. More than 120 groups are members of ANCO, each featuring between 10 and 70 members. ANCO processes more than 50 tons of honey a year, but keeps no precise statistics. The groups produce very different volumes, depending on the size of the group and the efforts of its members. It is worth noting that ANCO buys honey exclusively from its members. The purchase and selling price are negotiated and agreed by the Managing Committee of ANCO generally in an open meeting.

HONCO is another cooperative that brings together groups of honey producers in the Northwest. HONCO has about 3,600 members belonging to various groups, but only 12 of these groups are active in the production of Oku White Honey. On

average, HONCO affiliated producer groups have no more than two members. HONCO purchases honey exclusively from its members and does not practise any transactions via brokers or intermediaries.

The domestic market

Oku White Honey is considered a rare product in Cameroon. This honey can be purchased in the region of production itself, Oku and the other villages in the Kilum-Ijim forest area, and in the Northwest region in general especially in the main town of Bamenda. It is also commercialized in Kumbo, which is another major city in the Northwest region, and beyond the northwest region, the white honey is commercialized in other major urban centres, Yaounde and Douala, and certain other cities such as Buea, the capital of the Southwest region.

According to ANCO officials, the domestic honey market could increase through awareness campaigns to attract consumers' attention on the nutritional qualities and medicinal properties of the product. According to ANCO executive secretary, increased consumption could entail lower prices and render Oku White Honey accessible to all levels of society.

Oku White Honey is mainly intended for consumption in the domestic market, where it is renowned for its quality and is consumed as a food product. Furthermore, it has been suggested that an NGO in Kumbo (another town in the Northwest region) and many traditional practitioners in the Northwest region use this white honey in the preparation of medicinal products.

Export markets

A number of study reports and conference proceedings that have been published so far on the honey industry in Cameroon have largely focused on describing the typology of actors involved in honey production and commercialization and have expanded on their expertise and know-how. One element that has also been analysed in the reports is the value chain of the honey, the analysis of which has so far been limited to the national market.⁸ There is therefore very scanty information on the export market of Cameroon honey in general and Oku White Honey in particular. This suggests a need for a study to be undertaken to assess the scale and the potential for developing an international market for Oku White Honey. However, it seems that white honey is exported from Cameroon to Gabon, Equatorial Guinea and Nigeria, but producers and cooperatives in Bamenda are not aware of the prices charged for export.

Cooperatives often deal with wholesale buyers, but they do not know the price at which these intermediaries sell the honey in the domestic or export markets. Cooperatives also seem not to be interested in obtaining this information, their main concern being limited to the production and commercialization to local buyers in order to ensure a stable income for their members.

Analysis of the value chain

The main actors in the honey industry in the Northwest region of Cameroon are structured and interlinked as follows: individual producers are organized into CIGs, which are themselves grouped into cooperatives, such as HONCO or ANCO. Producers sell their produce to cooperatives and through their associations/CIGs. In most cases, cooperatives operate selling points or small shops in Bamenda where the product is sold to consumers. Some bulk buyers order directly from cooperatives and pick up their order from the cooperative shops in Bamenda. Cooperatives organize the collection of honey from groups, along with the transport to Bamenda for refining and packaging. As previously mentioned, Oku White Honey is primarily intended for the domestic market.

Prices quoted by our various informants at the various stages of the value chain are usually quite different. It is therefore difficult to draw conclusions as to the precise configuration of this chain. Prices quoted in this chapter should be read as estimates. It seems that the prices charged by producers are fairly homogeneous in a given period. At the time of fieldwork in January 2011, the price of buying a jar of 20 litres from the producer group is estimated at about 24,000 XAF (about US\$53) for regular quality honey and at approximately 30,000 XAF (about US\$66) for white honey, in other words at about 1,200 XAF/litre (US\$2.7) for ordinary honey against 1,500 XAF/litre (US\$3.3) for white honey. According to others, the Oku cooperatives sell white honey at around 2,000–2,500 XAF/litre (about US\$4.4–5.5). Other quotes indicate that small producers sell their honey production, mostly crude (unrefined), at a price ranging between 600 and 1,000 XAF/litre (about US\$1.3–2.2).

In any case, the cooperative further refines the honey before bottling and labelling it as discussed above. The average price of a litre of Oku White Honey in Bamenda cooperative stores is around 2,500–3,000 XAF/litre (about US\$5.5–6.6) while about 1,700 XAF/litre (about US\$3.7) is the price of regular honey. The consumer selling price is set following an appraisal of the various prices practised in the honey market in Bamenda, taking into account the average price charged by other cooperatives in their respective stores.

Finally, the retail price of Oku White Honey in the shops in Yaoundé is reported to be in the region of about 7,000 XAF/litre (about US\$15.5). This price is worth comparing with the price of regular quality honey, which is at approximately 3,000 XAF/litre (about US\$6.6) on the shelves of retail shops in Yaoundé.

Apparently, no form of eventual vertical integration can be foreseen for producers, as each producer operates at a strictly individual level and has no substantial financial means to achieve large-scale investment.

Vertical cooperation in the value chain

Vertical cooperation is an important feature of production and commercialization of Oku White Honey, since most producers belong to a producer group, as previously described, which in turn is member of a cooperative supporting the commercialization of honey, either directly to final consumers through selling points in Bamenda, or

through intermediaries who ship the product to various retailers throughout the country or towards foreign markets.

Potential benefits linked to GI protection

Most actors consulted during fieldwork stressed that, based on the information they had received from OAPI regarding the concept of geographical indications, this tool has strong potential to benefit them if applied to Oku White Honey. The main potential benefits identified for Oku White Honey GI protection concern the impact of eventual labelling on the development of the organizations of producers, and also in improving the quality of the product. Protecting the Oku White Honey will also enable producers to better defend their product against counterfeiting attempts, and may help achieve a premium price on retail shops.

Technical support in the form of capacity building in the exploitation of the GI by producer organizations is required both from national authorities and the OAPI itself, as it plays a crucial role in ensuring successful implementation of this protection. Obviously the range of benefits that can be anticipated from implementing geographical indication protection will also depend on the controls put in place to ensure compliance with the relevant technical specifications.

Protection seems particularly likely to enable further development of existing markets, as, to some actors it is a form of direct advertising for the product. Access to new markets should also be facilitated as a result of the increased cooperation among producers that might collectively consider opening new shops in Cameroon, beyond Yaoundé and Douala. Finally, this protection should prove effective in protecting ecosystems and landscapes, as protection of the local flora is, by definition, crucial to safeguarding the taste and colour traits of Oku White Honey.⁹

Potential problems and disadvantages linked to GI protection

Among the potential disadvantages that might arise from an eventual geographical indication protection for Oku White Honey, worth noting is the cumbersome and lengthy process of designation, development of the technical specifications and product registration and the potential costs associated with these activities. The required controls linked to the introduction of GI protection is also likely to be a hurdle for some producers, and may even lead to their exclusion from the protection system, thus rendering these producers economically vulnerable. Difficulties relating to the identification of biological or cultural attributes of the product, which indeed exist, are nonetheless expected to be resolved through the ongoing process of development of the technical specifications.

The legal and administrative complexity associated with the development of an effective system for the protection of a geographical indication such as Oku White Honey is obvious. Nonetheless, the burdens such as the need in financial and human resources associated with this endeavour in the case of the Oku White Honey are expected to be borne by OAPI and the respective state administrations

including but not limited to the Ministry of Agriculture and rural development and the Ministry of Technological Development. As for the possible difficulties linked to the implementation of appropriate governance structure to manage the protected Oku White Honey GI, many interviewed during fieldwork emphasized the need for state support to the organizations of honey producers.

On the other hand, some actors mentioned the likelihood of exclusion or marginalization of some products if the introduction of GI protection for Oku White Honey succeeded in bringing about more income to the producers of the protected GI. Beekeeping is already one of the most lucrative income-generating activities in the agricultural sector as compared to other activities such as the farming and commercialization of foodstuff such as corn. But this feature of beekeeping has, however, not pushed farmers to abandon other farming activities. In this respect, some actors are doubtful about the extent to which the Oku White Honey protected GI will drive farmers to abandon other farming activities. However, most actors point to the real possibility that the economic value created through GI protection will be captured by players downstream, mainly traders and distributors.

In terms of demand, it should be noted that Oku White Honey is consumed by the middle to the upper classes of the population, at the national level, and is thus considered a product for the rich. There is therefore a low risk of economic exclusion of local demand due to higher prices for white honey. However, the protection of this product, which is also consumed for its medicinal properties, for example as a substitute for sugar in cases of diabetes, could make access more difficult for low-income populations consuming it for medical purposes.

Although some of the consulted parties saw a considerable risk in the possibility of dispute regarding ownership of the geographical indication, particularly between national authorities and the local population or authorities, the possibility of such a dispute is being addressed within the framework of the development of the technical specifications. Indeed, from the perspective of some of actors involved in this process, one of the key issues that the technical specifications are expected to address is the clarification of the roles and responsibilities of eligible groups, state institutions and OAPI in the exploitation and monitoring of the use of the Oku White Honey GI.

Beyond these potential disadvantages, it is the view of many actors that a number of basic issues must be addressed in order to successfully realize the protection of the Oku White Honey GI. More specifically, issues that need to be addressed include the need for accompanying measures to support producers in their struggle to label and promote their product, the need to develop the collective organization of the sector, which is still taking baby steps, and most importantly, the need to make financing tools available to producers to enable them to develop the adequate production and packaging tools so as to respond to the requirements crafted in the technical specifications.

Other legal tools complementary with GI protection

The other product protection regimes that have been identified as complementary to the protection of GIs include protection of biodiversity, in the case of natural

products, which in the context of the honey production would include instruments regulating access to the forest and use of its components, such as plants and bees, that are useful in honey production. Furthermore, intellectual property rights instruments such as patents and trademarks were mentioned by some intellectual property specialists to the extent that these tools may be applied to processed natural products such as refined honey or both the traditional and modern methods of know-how used in the process. The current landscape of environmental regulations in Cameroon gives prominence to state ownership of the forest and land resources. Nonetheless, as has been argued in separate assessments, there are clear provisions in the current landscape of forestry and environmental regulations in Cameroon that provide for local communities' rights to own certain pieces of forest and exploit the resources therein on the basis of an agreed management plan with the forestry administrations, in the context of the community forest scheme.¹⁰ Sustainable exploitation of forest resources used in honey production on the basis of existing environmental regulations is undoubtedly critical for the sustainability of the honey industry, if such honey has to be available for any prospective eligibility for further protection through a geographical indications tool. But, as far as the possibilities for using other intellectual property tools for protecting innovations (through patents) or the commercial interests (through trademarks) associated with the honey production, most intellectual property experts acknowledge the fact that protecting traditional know-how for honey production or local tools through patents will be very difficult to achieve.

To date, no known initiative has been taken by any producer of Oku White Honey to protect the product, either through trademark registration of their various labels used in the many packages of Oku White Honey or by any other instrument of protection. It should be noted that according to Alphinoor, an OAPI accredited intellectual property firm based in Yaoundé, the cost of trademark registration in Cameroon is at approximately 400,000 XAF (about US\$884). This cost is very high and thus prohibitive for several NGOs and CIGs involved in the production and commercialization of honey in the Northwest province in Cameroon. That and the administrative complexity for pursuing the protection of intellectual property rights such as trademarks are among other bottlenecks that prevent many small organizations in a country such as Cameroon to pursue proper protection and enforcement of IP rights.

Conclusion

The African Intellectual Property Organization (OAPI) is confident that its current efforts in pursuance of the implementation of one of the tools of the 1999 Revised Bangui Agreement Annex VI, which deals with the protection of geographical indications, will deliver a concrete outcome in 2011. It is indeed the view of the Director General of OAPI and, indeed, of most of his senior collaborators who are heavily involved in the GI programme of OAPI, that, if not one product from Cameroon, understood to be the Oku White Honey, there is hope that OAPI will be able to achieve protection as GI of its first two products from Cameroon, namely, Oku

White Honey and Penja White Pepper. To achieve this outcome, OAPI, as the coordinating body, is incentivized by first, financial contributions from donors, chiefly the French Development Agency, and other financial contributions including financial and technical support from CIRAD France, SNV-Cameroon and not least the World Intellectual Property Organization (WIPO). In addition, the state of Cameroon, through the various government departments, is providing considerable political and administrative support, which is obvious through establishment of the national committee of geographical indications that operates under the oversight of the office of the Prime Minister. Critical to any hope to achieve a positive outcome is the involvement of the associations of honey producers who are hopeful that, using a legal tool to emphasize the origin and identity of the Oku White Honey, will not only bring a premium price but will undermine any attempt by other honey producers to misuse the appellation of Oku White Honey on the market, therefore securing the market share of the Oku White Honey nationally and internationally.

Notes

- 1 This report indicates that among the nine products initially identified were Burkina Faso (Haricot vert et Beurre de Karité); Cameroun (Manioc et Canne a sucre); Côte d'Ivoire (Riz de Man et Toile de Korhogo) and Guinea (Ananas de Mafrenya et banane de Naine).
- 2 Although the national committee has been established formally, recent enquiries from some actors involved in the GI process in respect of the Oku White Honey indicate that members of this committee are yet to be nominated.
- 3 Key informants, including senior staff at OAPI, have always stressed their endeavour to promote GI protection within the framework of the implementation of Annex VI of the Bangui Agreement. They have benefitted from a number of agencies including, but not limited to, the Centre de Coopération International en Recherche Agronomique pour le Développement (Centre for International Cooperation on Agricultural Research for Development-France, CIRAD).
- 4 These groups or associations are largely organized as Common Initiative Groups (CIG).
- 5 For more information about the Kilum-Ijim Forest Project managed by Birdlife International in collaboration with such partners as the Government of Cameroon, see www.birdlife.org/action/ground/bamenda/bamenda3.html, accessed 26 August 2011.
- 6 On a general note, an evidence of the know-how held by honey producers in the northwest region of Cameroon is through the publication of a booklet on beekeeping in the region. Information published in the booklet was provided by beekeepers themselves based on their practical experiences in honey production from the construction of hives all the way through to the harvesting of honey, its processing, packaging and commercialization. For more information (see: Bonu 2001).
- 7 Bridier and Chabrol (2010) also discuss the beekeepers' of the Northwest region of Cameroon, especially in the Kilum-Ijim area, specific know-how regarding beekeeping for the production of white honey.
- 8 See, for example, the 2008 report by Anembon Consulting, 'Value Chain Analysis for Honey and Bee Products in the Kilum-Ijim Mountain Forest Region, Northwest Province of Cameroon', SNV-Cameroon; and a 2006 conference proceeding jointly published by PECTEN-Cameroon, SNV-Cameroon and WHINCONET-Cameroon, 'Honey Marketing Forum Conference' Limbe-Cameroon, November.
- 9 The Apiculture and Nature Conservation Organization (ANCO) is a strong advocate of the link between biodiversity conservation, sustainable apiculture and poverty alleviation.

Field activities carried out by ANCO aim to address these three areas as the organization contribution in the realization of the sustainable development concept.

- 10 A number of studies have explored the landscape of forestry and environmental legislation in Cameroon, looking into the respective rights of the state on the one hand and local communities on the other, as far as ownership, control over access and exploitation of forest resources are concerned. See, for example, Mahop (2004, 2007, 2009).

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8

ETHIOPIA: FINE COFFEE¹

Getachew Mengistie

Introduction

Ethiopia is the birth place of coffee. The name coffee is taken from the name of an administrative region called 'Kaffa', where coffee was discovered and grows wild (Lewis 1953: 48–9). Coffee was taken from Ethiopia to Yemen,² from Yemen through Arabia in the 16th century to Egypt and Syria, then to Turkey, and from Turkey to Europe (Lewis 1953: 49). The Europeans then took coffee and introduced it in their colonies. Ethiopia is not only the place of origin for coffee, but also possesses 99.8 per cent of Arabica's genetic diversity, which enables the country to produce different coffee types with vast range of inherent characteristics that make the coffee types unique and distinctive. The Arabica coffee that is produced by other countries in the world is derived from about 4–5 gene bases, taken from Ethiopia (Kotcha 2007: 4). The rich genetic resource pool is attributed to the different coffee growing agro-ecological zones and natural factors such as rainfall, shade, altitude, climate and soil. Coffee grows in almost all administrative regions of Ethiopia under different conditions ranging from the semi-savanna climatic condition of the Gambela plain to the continuously wet forest zone of the south western region. Ethiopia's genetic resources are unique and have special values in many respects. For example, Arabica is 95 per cent self-pollinating and in breeding as opposed to Robusta, which is cross pollinating (Kotcha 2007: 4). Moreover, the value of the huge genetic resource pool of the country could also be expressed in terms of its use to produce high yield and disease resistant varieties as well as preferred traits such as low caffeine or caffeine-free coffee.

Coffee has economic, environmental and social significance in Ethiopia. Coffee accounted for, on average, 51 per cent of the total value of Ethiopia's export earnings for the period 2000–2005. In 2007, the share of coffee in the export earnings of the country was 37 per cent. Although there is a decline in the share of coffee, it is still the leading merchandised item for Ethiopia's foreign exchange earnings. Coffee is not

only the major source of the country's export earnings, but also provider of employment opportunity. One quarter of the population is engaged in coffee production,³ transportation and marketing. About 45 per cent of the coffee is produced in forest and semi-forest areas. Moreover, coffee that grows in the backyards of small farmers, known as garden coffee, constitutes about 50 per cent of the total coffee production; plantations, which account for 5 per cent of the coffee production, also grow under shade trees. Coffee production and shade trees are linked that coffee helps to protect the environment and conserve valuable genetic resource.

Coffee has also social and cultural benefits. It is used in social interactions such as get-togethers with family members, neighbours, celebrations, mourning and treating guests and visitors. Ethiopia is the largest consumer of Arabica coffee in Africa, about 50 per cent of the total production is consumed locally.

Coffee production, processing and quality control

There are four types of coffee farming systems in Ethiopia: forest-coffee,⁴ semi-forest coffee,⁵ garden coffee,⁶ and plantation coffee.⁷ Western Ethiopia produces most of the forest and semi-forest coffee. Much of it grows wild under the canopy of high trees in the lush, dense forests that cover the mountainsides. No modern inputs such as chemicals and fertilizers are used for forest, semi-forest and garden coffee production. These production systems are unique from the coffee growing systems elsewhere in that they are controlled by ecological conservation principles and embrace the basic characteristics of agro-ecological sustainability. As a result, Ethiopian coffee has acquired the reputation of being natural and organic.

More than 95 per cent of the coffee in Ethiopia is produced by smallholder farmers, while the remaining 5 per cent comes from private and government-owned large-scale farms. Ethiopia's annual coffee production is estimated between 300,000–330,000 tons and characterized by low productivity when compared with other countries such as Kenya, Brazil, Colombia, Costa Rica and El Salvador. There are two methods of coffee processing: wet-processing and sun-dried. In wet-processing, the red cherry is collected and pulped to remove the parchment and the mucilage from the beans, and then fermented under water, for further removal of mucilage, then washed and dried. This process results in what is known as 'washed coffee'.⁸ In sun-dried processing, fresh, ripe berries are dried on mats or floors immediately after they have been picked. After drying to a moisture content of about 11.5 per cent, the outer layers of the cherries are removed by hulling and the commercial bean obtained.

There are quality control procedures that are followed starting from the coffee farm to the coffee exchange and export market in order to ensure quality of export coffee, and thereby maximizing return. Farmers normally harvest coffee cherries that are fully ripe and perform primary dry or wet processing. The supplier, who buys coffee from the farmer, has a duty to perform a quality check. The law imposes obligations on the supplier to ensure that coffee submitted to coffee quality liquoring and inspection centres conforms to the quality requirements and standards and has a moisture content of not more than 12 per cent.⁹

The government has established coffee liquoring units and quality control mechanisms at regional and central levels to check the quality before coffee is sent to the auction centres or the commodity exchange. In every major coffee-producing district, there is a quality inspection office that checks the grade and quality of every truckload before the product leaves for the central quality grading and auction centre. Any coffee that does not meet the minimum standard which is more than 11.5 per cent moisture content and 8 per cent impurities by volume, is rejected on the spot.

The pre-inspected coffee, which meets the quality requirement by regional or district quality control organizations, is sent, as closed with seal, to the coffee quality liquoring and inspection centre.¹⁰ The powers and duties of the centres, among other things, include: to verify that the coffee is properly sealed and delivered; to grade the coffee after performing quality test and examination based on representative sample, and to issue a certificate that certifies the coffee is prepared in accordance with the characteristics of the agro-ecology of its production area and meets the required grade before coffee is exported.¹¹

Coffee marketing and export

The Coffee Quality Control and Marketing Proclamation, No. 602/2008, defines where and how coffee transactions have to be undertaken, and outlines the obligations of persons involved in coffee transaction. The Proclamation requires that coffee transaction takes place at the Ethiopian Commodity Exchange,¹² the auction centres or local markets established by the Ministry of Agriculture and Rural Development or appropriate regional entities.¹³ Failure to comply with this requirement results in punishment.¹⁴ The penalty includes a fine of Birr 20,000, which is about US\$2,000, and imprisonment of not less than one year, but not exceeding three years.¹⁵

There are a number of actors involved in a coffee marketing chain. These include the coffee producers,¹⁶ suppliers,¹⁷ the Ethiopian Coffee Purchasing Enterprise,¹⁸ the Ethiopian Coffee Export Enterprise¹⁹ and private exporters.²⁰

The Proclamation prescribes the obligations of persons involved in coffee transactions to conduct coffee transactions only at transaction centres and to acquire a certificate from the Coffee Quality Liquoring and Inspection Center before submitting coffee to auction centres or the Ethiopia Commodity Exchange or consigning coffee to domestic or export market and that they abstain from all acts that may result in the defamation of the good name of the country's coffee.²¹

The Proclamation clearly specifies the role of each of the actors in marketing as well as the place of purchase and selling of their coffee. Suppliers may buy coffee from producers and sell their coffee after processing at auction centres or the Ethiopia Commodity Exchange within six months of processing.²² Domestic wholesalers can purchase coffee for domestic consumption only from auction centres or the Commodity Exchange and sell coffee at the local market only.²³

Coffee export is done by private exporters and coffee producers. The private exporters, who buy coffee at the auction market or the Commodity Exchange, are required to process coffee in accordance with the country's quality standards and

are allowed to export coffee collected from their own farm or purchased from the auction centres or the Ethiopian Commodity Exchange.²⁴ Coffee producers are allowed to sell only their processed coffee that is graded and certified by the quality inspection centres.²⁵ Unlike the exporters, they are not allowed to purchase coffee from the auction centres or the Commodity Exchange and export.

Institutional framework governing the coffee sector

At present, the governmental organizations that are involved in the regulation of the production, development, processing and marketing of coffee include the following:

Ministry of Trade and Industry,
Ministry of Agriculture and Rural Development,
Ethiopia Commodity Exchange, and
Ethiopia Commodity Exchange Authority.

The Ministry of Trade and Industry is entrusted with the function of issuing licence to coffee exporters. The Ministry of Agriculture and Rural Development is involved in the improvement of coffee production and processing, quality control as well as establishing and overseeing the Ethiopia Commodity Exchange and coffee auction market. The Ethiopia Commodity Exchange was established by law in the Ethiopia Commodity Exchange Proclamation No. 550/2007, on 4 September, 2007, with the objectives to:

- Create an efficient, transparent, and orderly marketing system that serves the needs of buyers, sellers, and intermediaries, and promote increased market participation of Ethiopian small scale producers;
- Provide a centralized trading mechanism, in which bids are coordinated through a physical trading floor with open bidding or an electronic order matching system or both;
- Provide a modern office service to record, monitor, and publicly disseminate information on exchange transactions;
- Provide standardized grade specific contracts as the basis of exchange trading;
- Conduct trading on the basis of product grade certificates and guaranteed warehouse receipts;
- Clear and settle all transactions conducted on the exchange to minimize default risk;
- Provide a mechanism for dispute resolution through arbitration;
- Provide timely market information to the public;
- Carry out market surveillance to ensure the integrity of the members and of the market, and
- Avoid contingent risk to the market through implementing risk management by introducing proper management mechanism.²⁶

The Ethiopian Commodity Exchange started operation as a coffee transaction centre in November 2008, and since then it has been serving as a market place for coffee, where transactions are conducted in a transparent manner. The Ethiopia

Commodity Exchange Authority was established by law on 4 September 2007,²⁷ as a public enterprise, entrusted with the task of regulating the proper functioning of the commodity exchange. The Authority has general and specific objectives. The general objective is to 'ensure the development of an efficient modern trading system, and to regulate, control, and secure transparent and stable functioning of a commodity exchange and to protect the rights and benefits of sellers, buyers, intermediaries and the general public'.²⁸ Its specific objectives are to:

- Promote responsible innovation, access to market information by all market participants and fair competition among markets and market participants;
- Deter and prevent price manipulation or any other disruption of market integrity;
- Ensure the financial integrity of all transactions subject to the proclamation and the avoidance of systemic risk; and
- Protect all market participants from fraudulent or other abusive trading practices and misuse of consumer assets.

The Authority is vested with a wide range of regulatory powers to realize its objectives.²⁹

The Ethiopian Fine Coffee Designations Trade Marking and Licensing Initiative

Ethiopia produces some of the finest coffees in the world³⁰ having unique flavours and aromas. These distinctive features distinguish not only Ethiopian fine coffees from coffees produced in other countries, but also differentiate the various coffees within Ethiopia itself. Harar/Harrar,³¹ Yirgacheffee³² and Sidamo³³ each represent a distinct aroma and flavour. These qualities, which constitute the intangible value incorporated in each of the coffees, are the result of the hard work of generations of Ethiopian coffee farmers. The designations or brands of the fine coffees have been used in marketing single origin coffees by foreign coffee distributors together with their brands.³⁴ Professor Doug Holt describes such use as 'ingredient brands'.³⁵ Since consumers attach greater value to the brands, Ethiopia's fine coffees command good and sometimes very high retail prices in world markets. In the US market, for example, Harar was retailed up to \$24/lb in 2004 and Sidamo retailed up to \$26/lb in 2005 (Shirkina 2005). The demand for gourmet coffee increases with the rapid growth of the specialty coffee market,³⁶ and the increasing consumption of espresso blends. Ethiopian fine coffees are sold as a single origin coffee in the specialty coffee market and are included in almost all espresso blends to improve their taste.

Despite the increasing preference and demand for Ethiopian specialty coffees, the export price of most of Ethiopia's renowned coffees usually fell within the range of \$1.10–\$1.30/lb., with a premium of only \$0.1–0.3 over the New York-based price for lower quality coffees. A study by Light Years IP (LYIP) reveals that only 5–10 per cent of these high coffee retail prices come to Ethiopia, while the rest goes to distributors and middlemen of fine coffee.³⁷ This means about \$0.62–0.74 a pound goes back to coffee growers. This low income could not enable the majority of farmers to meet their basic needs such as food and clothing. The low income from the fine coffees

and lack of incentives forced the farmers to cut down coffee trees and substitute with a narcotic plant called Chat/Quat. Chat fetches a higher price than coffee and it can be harvested three times in a year whereas coffee is harvested just once. Chat production and marketing have shorter-term benefits, but involve adverse consequences on the environment, genetic resources and health. Most of the fine coffees grow under shade. Cutting down the coffee trees results in cutting down the shade trees. This adversely affects the environment. Moreover, if the trend continues, it may result in genetic erosion and the ultimate loss of valuable coffee genetic resources not only to Ethiopia, but also mankind at large.

The need for capturing intangible value using appropriate IP and business tools resulted in the birth of the Ethiopian Fine Coffee Designations Trade Marking and Licensing Initiative. The major objectives of the Initiative project, launched in 2005, were to:

- Ensure Ethiopia's ownership over the valuable coffee designations that represent the commercial reputations and good will of the fine coffees;
- Increase and secure the income of poor farmers; and
- Build intellectual property assets protection and management capacity.

The Initiative focused, in particular, on improving the income of poor farmers, and thereby reducing poverty and creating price stability by 'effectively de-linking' export prices from the commodity pricing mechanism and linking them to the price of the fine coffees in the retail markets. This can be attained by capturing the intangible values incorporated in the fine coffees using appropriate intellectual property tools and exploiting them with relevant business strategy and marketing tools. The Initiative aimed at protecting the fine coffee brands through trademarks and increasing brand value in cooperation and partnership with coffee companies. Such an arrangement will help to promote the fine coffees and enhance consumer recognition as well as to relate the price of the fine coffee to brand value. Linking export price to retail market brings a major impact in poverty alleviation and stimulating farmers to improve the production system and the quality of coffee in the ever-growing specialty market. This, in turn, will meet the needs of coffee importing and distributing companies as well as the consumers.

There is a strong belief that 'with a concerted brand strategy the retail brand value of the three coffees: Harar, Yirgacheffee and Sidamo in a growing world market for fine coffees, the Initiative will easily deliver additional revenue to the chain as a whole, providing the framework for gradual increases in export price as a share of retail price, without harm to distributors'.³⁸

Selection of brands

A comprehensive study was made to identify the intangible values of the Ethiopian fine coffees, analyse the market situation and identify the best IP and business strategies. Extensive consultations were made in and outside of Ethiopia with the stakeholders, key partners and experts in the field. The study revealed that there are a number of coffee designations that represent the good will and reputations of Ethiopia's

fine coffees. However, there was a need to give priority to certain brands due to resource constraints. The Stakeholders Committee, which consists of leaders of coffee producers, cooperative unions and private coffee exporters association as well as representatives of relevant governmental organizations, decided that three coffee brands, namely, Sidamo,³⁹ Yirgacheffee⁴⁰ and Harar,⁴¹ be protected as intellectual property assets, in major coffee import destinations and countries that are deemed to be of strategic importance or future markets, using trademarks. The selection of the designations was based on criteria that include export potential, size of beneficiaries whose lives will be impacted by the programme, greater consumer recognition and demand in foreign markets.

The coffee brands designate fine coffee that grows not in a specific locality, but in different localities of different regions of Ethiopia, mainly Oromia and Southern Nations, Nationalities and Peoples' Regional States. 'Sidamo' designates coffee that is produced in different localities in Southern Ethiopia, such as Sidama, Gedeo, Borena, Kercha/Guji, Kambata, Walayta, Wenago, Ggelana and Abya. 'Yirgacheffee' grows in Gelana, Abaya and Wenago districts while 'Harar' is being produced in Arsi, Western and Eastern Hararge regions of the Oromia Regional State.

Geographical indications, certification marks and trademarks were identified as possible intellectual property tools to protect the selected fine coffee brands. The merits and demerits of each of the tools were studied. Extensive consultations were made in Ethiopia and abroad. Based on the findings of the study and the consultations, a proposal was prepared and submitted to the Stakeholders Committee. The Committee decided to protect the brands using trademarks and determined the list of countries⁴² where trademark applications should be made. Geographical indications were found to be inappropriate because the products are not confined to one locality, but grow in different localities.

The designation 'Yirgacheffee' is a name of a village in Southern Nations, Nationalities and Peoples' Regional State. However, the coffee that is produced in this area is not all Yirgacheffee. It is possible to get coffee on one side of a mountain that meets the cup profile of Yirgacheffee and other coffee on the other side of the mountain.⁴³ The designations 'Sidamo' and 'Harar' do not primarily represent the specific geographical locations where the fine coffee grows.⁴⁴

Of course, the selected brands are indirect indications of an Ethiopian origin, but it was decided to utilize certification marks and trademarks to realize the objectives of the Initiative. Although in most countries, geographical locations are insufficiently distinctive to secure registration as trademarks, it was considered that the selected designations would not be regarded as geographical marks in target markets. Trade-marking the coffee designations would be important for allowing control of the brands and ensure long-term benefit through licensing arrangements and to build the goodwill and reputation of the specialty coffees around brands.

Development of project proposal and resource mobilization

Protecting the Ethiopian fine coffee designations through trademarks and ensuring reasonable share of the benefit of poor farmers and small traders require technical

expertise and financial resources. LYIP in consultation with EIPO, coffee producers' unions, coffee exporters and relevant governmental organizations, developed a project proposal in 2004. Extensive consultations were made in and outside of Ethiopia on the project proposal and its strategies. The strategies got acceptance by different actors and partners.⁴⁵ Eventually, the project was endorsed by the concerned government authorities.⁴⁶

The first phase of the project was funded by UK Department for International Development (DFID). The requisite legal expertise has been offered by Arnold and Porter, one of the top US law firms. The firm has been providing *pro bono* counsel on this programme since 2005. Had it been without the *pro bono* services of the firm, a large amount of money would have been required, during the process of trademarking and licensing, which is beyond the reach and capacity of countries such as Ethiopia.

Status of trademark applications and titles granted

EIPO filed applications for trademark registration of the three coffee designations – Harar/Harrar, Sidamo and Yirgacheffee – in 36 countries: Australia, Brazil, Canada, China, India, Japan, the countries of the European Union, Saudi Arabia, South Africa and the US since 2005. These countries are either major export destinations of the Ethiopian fine coffees or are deemed to be markets of the future. Titles have been obtained in the majority of these countries.

In the course of the trademarking process, a number of challenges were encountered and measures were taken to address the problems. In the US, the application for Sidamo could not initially be processed as a result of an earlier application by Starbucks.⁴⁷ Although, Starbucks decided to withdraw its application due to public pressure, the Ethiopian application faced opposition from the National Coffee Association of America (NCA), which filed a letter of protest. The examiner at the USPTO, based on the letter of protest, rejected Ethiopia's application on the ground that the designation is generic. Ethiopia submitted a rebuttal against the decision supported by relevant laws and precedents along with evidence of the designation's distinctiveness. This position was accepted by the Office and certificate of registration for Sidamo was obtained in April 2008. With regard to Harar coffee, USPTO asked for further evidence and clarification. The project team furnished the required evidence and the Office registered Harrar coffee and granted the certificate of registration in June 2008.

In Europe, Neuform, a German company, opposed the application for Sidamo claiming that the registration of Sidamo would cause confusion with a mark called Sesamo, which it registered earlier. However, the name Sesamo is different from Sidamo and is used for different classes of goods.⁴⁸ In view of this fact, communication started with Neuform and eventually the company was persuaded to withdraw its opposition. Neuform required that the name Sidamo must be used in relation to coffee only. Eventually, an agreement was reached, Neuform withdrew its opposition and the registration certificate was granted to Ethiopia in February 2008.

In Japan, Harar/Harrar had been rejected on the grounds of prior registration and ownership by the Japanese coffee company, UCC Ueshima. Contact was made with

the company to deal with the problem amicably. Ethiopia offered a royalty-free licence agreement and in return asked UCC Ueshima to assign the right over the trademark. UCC Ueshima offered to waive its right against Ethiopia, thereby letting the country export and sell Harar coffee using the mark Harar. However, this was found unacceptable to the Stakeholders Committee, which insisted on assignment of the right explaining that the rightful owner of the mark is Ethiopia. Accordingly, UCC Ueshima consented to cancel its right. While preparations were made for reapplication, Ethiopia learned that All Japan Coffee Association filed a petition for the invalidation of the titles granted for Sidamo and Yirgacheffe. As a result, decision was made to defer the reapplication and deal with the petition. Ethiopia approached the Association and tried to persuade it to withdraw its petition. However, the Association decided to proceed with the petition. Ethiopia has submitted arguments against the petition based on legal grounds and furnished supportive evidence. The matter is now waiting for the decision of the tribunal of the Japanese Patent Office.

In Australia, all the applications were rejected on the grounds that the names are names of geographical places and lack distinctiveness.⁴⁹ The project team submitted a rebuttal against the decision of the trademark examiner. There is expectation that the decision will be overturned and certificates will be acquired in the same way as similar challenges were overcome in the US.

Licensing of the trademarked designations

Acquisition of trademark protection over the coffee marks meets only one of the objectives of the Initiative securing the right of Ethiopia over its intellectual property assets,⁵⁰ but not other objectives of the Initiative such as improving and sustaining the income of coffee growers and small traders in Ethiopia. There was, therefore, a need to design appropriate business strategy to exploit the acquired intellectual property rights. To this end, Ethiopia developed a licensing programme and has offered a royalty-free licence agreement since 2006. The Initiative is considered as a model that allows all those in the distribution chain from producer to retail distributor to benefit. The added value of the brands will create a sustainable and valuable relationship between the Ethiopian coffee sector and the licensed distributors.

The licence agreement is deliberately made very simple for coffee companies to understand their rights and obligations without seeking the assistance of lawyers. The licensing strategy is intended to:

- Boost consumer recognition of the registered trademarks;
- Increase the demand of Ethiopian specialty coffees; and
- Ensure, in the long term, a reasonable return from the sale of the coffee for Ethiopian farmers and small traders as well as foreign companies involved in the coffee trading chain. Improved income of the coffee growers will result in sustainable supply of improved quality of fine coffees that meet the needs of the coffee companies and consumers.

The Initiative aims at concluding licence agreements with 150–200 coffee importing, roasting and distribution companies. Until May 2009, 96 licence agreements have been concluded with coffee importing, roasting and distributing companies in North America, Europe, Japan and South Africa. Three coffee producer cooperative unions and 47 private coffee exporters in Ethiopia have also signed the agreement. This was made to ensure that the fine coffees identified by their brands are sold to the licensed distributors and facilitate compliance with the terms and conditions of the licence agreement.

The coffee companies that signed the agreement created a network of licensed distributors. The establishment of the network will, among other things, contribute to:

- Help the licensed coffee distributors to closely work with the Ethiopian fine coffee sector and facilitate the realization of common objectives such as enhancing the quality and quantity of the fine coffees and increasing income of all the actors involved in the production, processing and marketing of the fine coffees; and
- Facilitate action against infringement of the trademark rights and illicit use of the brands in marketing inferior coffee by counterfeiters.

The establishment of the network of licensed distributors is complemented by the setting up of an institutional framework, a joint forum, which brings the licensed companies and the Ethiopian stakeholders together to discuss issues of concern and promote common causes.

The members of the network of licensed distributors have concerns related to the quality and quantity of the fine coffees, sustainability of supply and traceability. The Ethiopian stakeholders' concern includes selling of the fine coffee using the brands, promotion and marketing as well as price. These concerns are shared by both sides and can be promoted as common causes and shared goals through an appropriate institutional framework. Cognizant of this fact, a joint forum consisting of licensed distributors from US and Canada as well as the Ethiopian coffee exporters, growers and representatives of relevant governmental organizations was established. The Forum held its first meeting in Addis Ababa, Ethiopia, on 14 February 2007. This was a historic event that brought coffee producers and distributors together for the first time and provided them with a framework to promote mutual interests and shared causes. Prior to the first meeting of the Forum, coffee growers did not know where the coffee ended up after it left the farm and the exporters did not know where it ended up after it left the port of Djibouti. The same was true for the licensed distributors, who did not know where the fine coffee came from. Moreover, there was no forum where both sides could express and address concerns and promote common causes.

The Forum held its second and third meetings in Long Beach, California, in May 2007 and Minnesota, Minneapolis, in 2008,⁵¹ respectively. In each of these meetings, both sides discussed issues of mutual interest and committed themselves to work together in the future on the basis of a strategy that aims at developing the markets and raising awareness of Ethiopian specialty or gourmet coffees.

The Forum contributes to ensure that the brand is uniformly presented in the market and thereby facilitating better recognition of the fine coffees by the consumers. The value of the brand will grow as recognition of the mark increases. This in turn increases the share of income of the stakeholders involved in the coffee production, processing and marketing.

Licensing of the trademarked coffee brands is managed by EIPO, LYIP and concerned Ethiopian embassies. The licensing activity in North America is managed by the Ethiopian Embassy in Washington, DC; Europe and Japan are covered by the Ethiopian embassies in London and Japan respectively. To coordinate activities with the embassies and manage licensing activities in other countries, EIPO established a Licensing Management Unit (LMU). The LMU facilitates coordination with licensed distributors, follows up decisions made in the joint forum, and manages and promotes the use of the Ethiopian fine brands through licensing arrangements. LYIP and the project team offer extensive training to members of the LMU and stakeholders. The LMU, supported by the Ethiopian embassies and the staff of LYIP, have the following activities:

- Contacting companies in the coffee supply chain that are dealing with the Ethiopian fine coffees;
- Negotiating and concluding license agreements for the use of the trademarked brands;
- Promoting the registered brands of the Ethiopian fine coffees and assisting licensees in the promotion of the brands and fine coffees;
- Providing information regarding the Ethiopian Fine Coffee Designations Trade Marking and Licensing Initiative;
- Documenting licence agreements and updating the list of licensees;
- Undertaking study and preparing guidelines in line with the decision of the stakeholders committee and the joint forum;
- Monitoring the activities of the licensed distributors and following up compliance with the terms and conditions of the license agreement by the licensees;
- Training the staff of the unit and others seconded by the key stakeholders such as exporters and coffee producers; and
- Attempting to resolve infringement cases.

As a result of the concerted effort made by the LMU, LYIP and the Project Team, a number of companies signed the licence agreement and joined the network of licensed distributors within a short period of time. Moreover, various coffee companies have begun expressing a keen interest in signing the agreement and joining the network. This has been made possible using promotional activities, for example, the Ethiopian Coffee Network website and participation of members of the LMU and the Project Team at the Specialty Coffee Associations Exhibition and Conference held in Ethiopia, Belgium and the US. These events provided opportunity to meet coffee distributors from the US, Japan, Canada and Europe and explain the objectives of the Initiative.

Branding strategy

The Government of Ethiopia hired a UK-based branding company, Brand House, to create simple, memorable and recognizable brand identities for each of the registered marks as well as an umbrella brand for the Ethiopian fine coffees. The Company developed an umbrella brand that may be used with each of the registered trademarks as well as other designations that may be registered in the future and specific brands to each of the registered trademarks under the guidance of the Stakeholders Committee and the Project Team. The umbrella brand and the three brands, which were approved by the Stakeholders Committee in February 2008, were unveiled at the joint forum that took place in Minneapolis, Minnesota. Brand House, under the leadership and guidance of the Stakeholders Committee, developed a brand guideline to define the terms and conditions of the use of the brands. The guideline, which was approved by the Stakeholders Committee in June 2008, will ensure uniform use of the brands by the licensed distributors, and facilitate brand promotion and increase the brand value of the fine coffees.

The branding exercise will also help in nation branding. It will make the country known by its finest coffees and enhance its image. In the course of promoting the Initiative, one of the problems the Project Team encountered was that many people did not know Ethiopia as a coffee-producing country contrary to the expectation of the project team. The country proudly claims itself as the birth place of coffee; however, many people do not know of this fact. During the dispute with Starbucks, it was common to meet people asking 'does Ethiopia produces coffee?' The branding initiative will thus help to address this problem and to promote the country, thereby making the country known not only as the birth place of coffee, but also as a supplier of the most renowned coffees in the world. This may in turn contribute to change the image of the country and serving as an attraction to tourists.

Dispute with Starbucks

The dispute with Starbucks started when Ethiopia learned that the company applied for trademark protection for the expression 'Shirkina Sun-Dried Sidamo' for 'whole coffee beans' in the US as well as in several other markets. 'Shirkina' in the Amharic language, the official language of Ethiopia, means partnership. Sun-Dried 'shows the method of processing of coffee that enhances the coffee quality'. According to Scott McMartin, Coffee Education Director of Starbucks, 'the coffee bean absorbs flavor characteristics from the fruit as it dries around them ... The application of the natural process ... has given this coffee a distinctive black cherry flavor, with hints of chocolate and dark rum finish'.⁵²

Ethiopia's application for registration of 'Sidamo' in the US, made in March 2005, was suspended due to the prior application by Starbucks. Ethiopia approached the company in order to resolve the problem amicably.⁵³ It asked the company to withdraw its application so as to facilitate the processing of Ethiopia's application and in return offered a royalty-free licence for worldwide use of the brand. The

company, however, ignored repeated requests to cooperate in resolving the matter. Ethiopia filed its opposition against the company's application. Starbucks withdrew its applications⁵⁴ for 'Sidamo' in all the countries where it had applied for registration after facing international pressure from different groups including international non-governmental organizations such as Oxfam-America and other partners. However, Starbucks continued creating obstacles and engaging in a public relations campaign aimed at discrediting Ethiopia's Initiative.

Ethiopia's strategy and position was to persuade Starbucks to call off its applications for registration in return for a royalty-free licensee agreement to use the coffee trademarks of Ethiopia. Ethiopia has, from the outset, made clear that it considers Starbucks as a valuable partner and that the Initiative is not only in the interest of Ethiopia's poor farmers and small traders, but also the Company⁵⁵ and its customers.⁵⁶ When Ethiopia offered a royalty-free licence agreement, Starbucks first responded by saying that 'Ethiopia does not have any legal basis for its claim' and rejected the offer.

Later on, the company raised 11 points of concern on the draft licence agreement. Some of the concerns such as considering the Initiative as contrary to the interests of farmers were unfounded and had no relevance to the issue at stake. However, Ethiopia made it clear that the concerns raised by Starbucks on the draft licensing agreement and others could be resolved in a positive and constructive manner.⁵⁷ Ethiopia further made its position clear in subsequent communications with the company's officials. Thus, there was optimism on the Ethiopian side that the dispute with Starbucks would be resolved once the company learned about the intention of the Fine Coffee Designations Trade Marking and Licensing Initiative.

Starbucks continued opposing Ethiopia's initiative and argued as if Ethiopia's approach was wrong and advised Ethiopia to opt for certification mark instead of trademarks.⁵⁸ It lobbied to persuade Ethiopia to change its approach and win the support of Sidama coffee farmers. But these efforts could not result in a change in Ethiopia's position. The preparatory works undertaken before the launching of the Initiative and the involvement of all the stakeholders from the inception of the project helped to provide clarity on the issue and to promote a common position in a unified voice.

Ethiopia pursued with its engagement strategy and sought to settle the dispute through negotiation, taking advantage of every opportunity to persuade the officials of Starbucks and bring its case to the public. This strategy was complemented by the work of different pressure groups. The US Congress and UK Parliament⁵⁹ members, renowned individuals such as Mary Robinson, ex-President of Ireland, the Ethiopian Diaspora, international non-governmental organizations, academia, students and the media shared the cause of Ethiopia, wrote letters, summoned the officials of Starbucks to hear the company's position over the dispute and/or launched a public relations campaign. The public relations campaign, which had the support of international NGOs, was very effective. Oxfam-America, for instance, managed to generate about 90,000 complaints against Starbucks within a short period of time. The persuasion strategy adopted by Ethiopia coupled with the public pressure and the extensive press and media comment forced Starbucks to reconsider its position and enter into a constructive dialogue and negotiations with Ethiopia.

Ethiopia and Starbucks made a joint press release, following a February 2007 meeting in Addis Ababa with Starbucks executives. In the statement, Starbucks for the first time agreed to respect the choice and right of Ethiopia to protect its coffee designations through trademarks and to create a network of licensed distributors. Moreover, the company promised not to oppose Ethiopia's Initiative. Both sides recognized their differences and agreed to deal with these through negotiation.

Based on the understanding mentioned above, the two sides met in Seattle, Washington, on 1–2 May 2007. The meeting resulted in a framework agreement in which Starbucks agreed, in principle, for the first time to recognize the trademark ownership of Ethiopia and enter into a marketing, distribution and licensing agreement acknowledging Ethiopia's ownership of the coffee designations both registered as a trademark and unregistered coffee designations.

Starting from 3 May 2007, negotiations were undertaken for nearly six weeks involving exchange of drafts between legal counsels and negotiations between the parties. The negotiation resulted in the agreement signed on 20 June 2007. The negotiation was made in a friendly manner. Each of the parties tried to understand the concerns of the other and addressed issues in a positive and constructive manner, and the agreement was finalized in a win-win manner. Under the agreement, Starbucks committed itself to use the trademarked brands when selling the fine coffees as single origin coffees, promote them, and render technical assistance in building capacity of farmers to enhance the quality of production of coffee. The agreement established the framework of cooperation and partnership.

The parties have agreed to meet once a year and work together for mutual benefits. Starbucks' top officials, during their visit to Ethiopia in November 2007, announced the decision to establish a farmer-support centre that would help build the capacity of the producers of the Ethiopian fine coffee to enhance the quality and sustain the supply of fine coffees. A follow-up visit made to Starbucks by the representatives of the Ethiopian Government officials and coffee exporters in May 2008 also helped to improve communications and enhance understanding that would benefit both Ethiopia and Starbucks. This partnership is exemplary in that it reflects how multinational corporations may cooperate with developing countries and work together for mutual benefit.

The licence agreement with Starbucks increases the credibility of the Initiative and inspires interest among other coffee companies for signing a licence agreement. A number of coffee companies expressed their interest to conclude a licence agreement with Ethiopia. The conclusion of a licence agreement with about 70 companies in 11 months since the signing of the agreement with Starbucks shows the success of Ethiopia's negotiation with Starbucks, which attracted the attention of similar companies.

Major achievements

The Ethiopian Coffee Trade Marking and Licensing Initiative has, so far, registered a number of achievements. Ethiopia holds trademarks for Harar, Sidamo and Yirgacheffee in 29 countries and two of its fine coffee brands Sidamo and Yirgacheffee in one

country within two years. Despite all the challenges, securing trademark ownership in 30 countries from the 36 applications could be considered as an impressive achievement. Licence agreements have been concluded, until May 2009, with 96 companies in the US, Canada, the UK, Germany, the Netherlands, Japan and South Africa. In Ethiopia, 47 private coffee exporters and three coffee producers' cooperative unions signed the licence agreement.

An effective institutional framework and coordination mechanism was established. A National Fine Coffee Stakeholder Committee, which consists of leaders of farmers' cooperative unions and exporters as well as relevant government representatives, was formed with the power to make key policy decisions on trademarking and licensing issues. Focal units were established in Ethiopian embassies in the primary consumer markets, Germany, Japan, the UK and the US, to work with the Initiatives' technical and legal advisors, initiate and follow up licence agreements, monitor infringement of trademark rights. EIPO leads the Initiative, serves as a secretariat of the Stakeholders Committee and liaises with LYIP, Arnold and Porter and focal units. The role of each of these institutional set-ups has been defined, and effective working relations have been established in order to facilitate smooth information flow, communication and coordination. The institutional arrangement helps to avoid duplication of efforts, make optimal use of the limited resource and increase efficiency and effectiveness.

The Initiative secured support from the House of Peoples' Representatives of the Federal Democratic Republic of Ethiopia, the Prime Minister's Office and relevant ministries. The public and private media played a role in sensitizing the general public and the stakeholders. The Initiative also gets support from a wide range of groups abroad including the Ethiopian diaspora, members of legislative bodies, NGOs, specialty coffee associations and coffee importing and distributing companies.

The Initiative strengthens Ethiopia's negotiating and marketing position in the specialty coffee market. This is made possible by securing trademark ownership of the three coffee brands and determining the conditions of use of the brands under licence agreements. Ethiopia is, therefore, now able to have the ability to control the use of the coffee trademarks, requires disclosure of sales information, requires joint promotion and uniform branding, and negotiate export prices. The Initiative helps to de-link fine coffee export prices from the New York market price for commodity coffee and link export prices to retail prices. It also helps in building up the confidence of the Ethiopian coffee growers and exporters to directly negotiate the export price of the fine coffees with the coffee importing and distributing companies and secure better prices.

After the launching of the Initiative, there is an increase in the demand and volume of export of the fine coffees. New companies are coming to Ethiopia seeking for the fine coffees. The Initiative and the high profile case with Starbucks, in particular, contribute to enhance awareness of Ethiopian fine coffees. Leaders of coffee producers' cooperative unions and exporters reported in 2007 that they began to sell a pound of Yirgacheffee for \$2–\$2.10. This was an increment of \$0.7–0.8 from the price that was received during the first and second quarter of the Ethiopian budget year of July to December 2007. The Ministry of Agriculture and Rural Development also reported that the price of the fine coffees rose between 8.9 per cent and 16 per cent and the

volume of export doubled in 30 days beginning from 7 February 2007. The Ministry of Trade and Industry on 29 July 2008, announced: 'Ethiopia exported 170,088 tons of coffee and earned \$525.2 million during June/July 2007/08 period compared with 176,390 tones that fetched \$424.2 million in 2006/07.' The improved marketing position is expected to sustain the increase or to secure even a higher price in the coming years.

A core group from EIPO, stakeholders and Ethiopian embassies have been trained on the Initiative to build core capacity for identification, protection and management of intellectual property assets.

Challenges were broken and disputes were resolved through persuasion. For example, the SCAA and Neuform, a German Company, were persuaded to relinquish their opposition against the application of Ethiopia.⁶⁰ Moreover, the dispute with Starbucks was resolved and successfully concluded through open and constructive dialogue.

The partnership established through the licence agreement, among other things, serves to pave the way for wider cooperation and assistance. Starbucks, for example, decided to establish a farmer-support centre in Ethiopia, which is the first in Africa and the second in the world after Costa Rica. This is a very positive step that may strengthen the Ethiopian coffee sector and meet the needs of the company for the supply of better quality coffee in a sustained manner.

A website, www.ethiopiancoffeenetwork.com, was launched in April 2007, as a medium for informing the public and the coffee sector on issues relating to the Initiative. The website helps to inform the public about the Initiative, facilitate exchange of information among the network members and disseminate information about the Initiative.

An internet-based Sales Management System (Sales Force) is implemented. This online information and sales management system enables continuous 'real time' sharing of information to clients and users. Furthermore, the system enables to compile information on prospective licensing including full contact and company information, detailed information on all contact with prospective licensees, and the ability to maintain information on licensees' post-signing, thus maintaining an efficient working relationship.

The level of recognition of the value of and the need for protection of intellectual property assets is increasing in Ethiopia. EIPO is working hard in this regard. Intellectual property asset identification, protection and exploitation have already been identified as a major area of the Office. Moreover, the government took a measure to strengthen the Stakeholders Committee by elevating its status and widening its responsibilities. There is a proposal to upgrade the Committee to an Agricultural Intellectual Property Assets Management Council, which will be headed by the State Minister of Agriculture and Rural Development and comprises of private exporters, large coffee farm producers, coffee producers unions and representatives of relevant governmental agencies and NGOs.

Ethiopia was selected as a portrait country for the 20th Annual Conference and Exhibition of the Specialty Coffee Association of America (SCAA), which took place

in Minneapolis, US, on 2–5 May 2008. This made Ethiopia the first country in Africa to get such an opportunity.

The branding of the three coffee trademarks as well as the existence of the brand guideline that define the conditions and manner of the use of brands is a significant achievement. It will facilitate not only brand recognition, but also contribute to national branding by making Ethiopia known by its most distinctive coffees and may contribute towards attracting tourists to production areas.

The establishment of the network of licensed distributors and the Joint Forum helps to enhance confidence on the Initiative, increase mutual understanding and strengthening partnership. The increased understanding of the goals and causes of the Initiative creates a sense of belonging, manifested by the excellent contribution made by licensed distributors, who bring in new licensees and educate other companies. The institutional set-up enhances partnership and facilitates working together with the Ethiopian stakeholders for common benefit and promoting shared goals and objectives.

The increased awareness on branding, as a result of the Initiative, brings in a brand culture in the coffee sectors. Exporters and coffee processors have begun to market their product using their own brands. This is a new phenomenon in the country that should be encouraged and supported.

Principal challenges and limitations

Lack of awareness

The efforts to use intellectual property as a tool to capture intangible values incorporated in export agricultural products of developing countries such as coffee is new. There was no prior experience. As a result, some of the stakeholders in Ethiopia were hesitant to accept the Initiative. Other key actors also regarded the Initiative with doubt and concern. There was a similar problem abroad. The feasibility of the Initiative and the approach adopted by Ethiopia were questioned. Many of the supporters of the Initiative initially doubted about the ability of Ethiopia, a least developed country, to master and use intellectual property as a tool for its benefit. This problem was worsened as a result of the negative media campaign during the dispute with Starbucks. There was thus a need to organize different forums with stakeholders and other actors and educate them about the Initiative as well as engage in responding to the negative media using different outlets and exploiting different opportunities such as international media.

Lack of capacity

The Ethiopian Intellectual Property Office was established in 2003, and the Initiative was conceived in 2004 and launched in 2005. The Office was then at the formative stage. There was a very limited capacity to effectively handle the technical and legal issues involved in the Initiative. These problems were addressed using the technical support of LYIP and the *pro bono* legal service of Arnold and Porter. Capacity building activities at different levels including EIPO, the stakeholders and coffee

growers were given emphasis in the first phase of the project. However, the planned activities were effected during the dispute with Starbucks. The project team was forced to focus on resolving the dispute. Moreover, the project resource was used to deal with the negative public relations campaign launched by Starbucks and educating the objectives and goals of the Initiative. In spite of these problems, it was made possible to train members of the Licensing Management Unit created within the EIPO, representatives of the coffee exporters, farmers and relevant government agencies including members of the focal units at Ethiopian Embassies.

Unifying diverse stakeholders

The stakeholders, which include farmers, exporters and the government, had different interests. This brought serious challenges, in particular during the development of the project proposal and the initial stages of the Initiative. There was thus a need to convince the stakeholders regarding the benefit of working together for common goals. This required patience, hard work and commitment of the project team in convincing and educating stakeholders about the goals of the Initiative and importance of joining hands for common cause and benefit.

Absence of secured and sustainable funding

DFID funded the first phase of the project, but failed to support the second phase of the Initiative. The major weakness of the programme was lack of a contingency plan in case funding discontinued. DFID's failure to finance the second phase of the project and lack of contingency plan had caused serious problems, which were partly mitigated when the government, stakeholders and other partners made contributions to the Initiative.

Absence of secured and sustainable source of funding is still a major problem. There is thus a need to establish a scheme such as a coffee fund to finance the Initiative and other related activities for the coffee sectors development in Ethiopia. This could be realized by:

Making contributions by stakeholders a certain percentage of the proceeds they get.

The amount of contribution could be determined based on a study on the income pattern of farmers, suppliers and exporters. The allocation of seed money by the Government of Ethiopia, and seeking contributions from partner organizations including donors which aim and work for the betterment of the poor.

The fund could be used to promote the brands, build marketing and negotiating capacity of the key actors, educate and train farmers and traders, pay for trademark registration renewal fees and to deal with infringement issues.

Lessons learned

From a thorough study and analysis of the Initiative, one could draw many lessons. The achievements of the Initiative are mainly attributed to the support it received

from the stakeholders and key actors and partners as well as the leadership of top officials of the Government of the Federal Democratic Republic of Ethiopia. The Initiative secured support not only from the House of Peoples' Representatives, but also from the Prime Minister's Office and ministers of relevant ministries. Had it not been for the support and leadership of the highest officials from the Government of Ethiopia, H. E. Meles Zenawi, Prime Minister of the Government of the Federal Democratic of Ethiopia, in particular, the Initiative would not have registered encouraging and positive results within a short period of time.

The technical support from LYIP and the *pro bono* legal service rendered by Arnold and Porter play crucial roles at different stages of the Initiative. Furthermore, the oppositions that were encountered during the process of applications as well as the various legal challenges faced in the negotiation of the licence agreements would not have been effectively addressed had it not been for the excellent support and *pro bono* legal service rendered by Arnold and Porter. The pre-emptive strategy pursued by Ethiopia and the advocacy work done by its international partners helped to prevent disputes and deal with some of the challenges outside legal proceedings. The pre-emptive and persuasive strategies also helped to persuade groups that opposed the Initiative and to win their support. In this regard, the opposition from the SCAA, which was persuaded to drop its opposition against Ethiopia's application in the USPTO, could be mentioned as one of the examples.

The engagement strategy adopted by Ethiopia enabled to resolve disputes faced during the application process, and to avoid the lengthy and costly litigation process. In this regard, the settlement of the dispute with Starbucks and the opposition in Europe against 'Sidamo' by a German company may be cited as examples. Direct communications and open dialogues are effective ways of settling disputes and overcoming challenges. The dispute with Starbucks took a long time due to reluctance of the company to sit down for negotiation. Once the company decided to talk, things changed. The parties developed mutual confidence and trust, shared their concerns and interests. This resulted in a positive and constructive dialogue and a final agreement that meets the concerns of both parties.

The participatory approach adopted by the Initiative is critical for its success. Stakeholders were identified and consulted during the process of development of the idea and are empowered to make key decisions. This helped to ensure ownership, transparency, uniformity and consistency in position. Attempts made by Starbucks during the dispute to disunite the coffee producers failed as a result of the participation and knowledge of the farmers about the Initiative since its inception. Preparatory works, advance planning and regular evaluation of achievements and challenges are crucial to success of any initiative or programme. The background study made before launching the Initiative, the extensive consultations conducted with the stakeholders and key partners in and outside of Ethiopia, the institutional arrangement for coordination and performance of specified tasks, etc., have helped to develop clear directions, goals and strategies. This in turn has contributed to overcome the challenges the Initiative encountered so far. The performance of the project team is evaluated on a regular basis and corrective measures are taken. New innovative strategies are identified and

implemented. The establishment of the Stakeholders Committee, comprising key actors from the public and private sector, is the epitome of public–private partnership, common in developed countries but not in developing countries in most cases.

Exporters and leaders of coffee producers' cooperative unions have been active in setting out primary targets and persuading others to join the network of licensed distributors. The Government used its contacts in dealing with the disputes. The partnership helped to deal with a number of problems encountered during the initiative. For example, the finance needed for the participation of Ethiopia at the 20th SCAA event as well as continuing critical activities of the project such as development of brands were made possible mainly as a result of major contributions made by the government, the cooperatives and exporters. Developing countries such as Ethiopia should thus aim to establish and foster public–private partnership in implementing similar programme.

Popularization and outreach programmes were developed and carefully implemented. These helped to deal with distortions such as those that were encountered in the media during the dispute with Starbucks as well as to educate the general public and potential licensees about the objectives and goals of the Initiative. The launching of the www.ethiopiancoffeenetwork.com website, for example, helps in sensitizing potential partners and promoting the initiative. It serves as a general information source for prospective licensees and other interested parties as well as responding to questions that prospective licensees may have before signing or concluding the licence agreement. Use of persons and partners who understand the goals and causes of a programme is an effective tool in creating awareness and popularizing a programme. Members of the licensed distributors, for example, played a meaningful role in educating other companies about the Initiative and persuading them to join the Initiative. The coordinated and target-oriented outreach programme coupled with the work of licensed distributors and other partners resulted in better understanding of the goals of the Initiative and promote the signing of the licence agreement. In this connection, for example, the licence agreements signed with 14 North American companies in two days at the occasion of the 20th SCAA Exhibition, held from 2 to 5 May 2008, could be mentioned

The Initiative involving all concerned partners such as producers and retailers helps to identify the needs of all the key actors and devise a strategy that may meet their needs as well as establishing a mechanism of working together for mutual benefits. Ethiopia and other countries at similar level of development need to know the needs of all key actors and address issues in a systematic manner and find common grounds that bring the key actors to work for common benefit and shared causes in launching similar programmes. Such an approach helps to avoid narrow perceptions and focuses by addressing the needs and concerns of all stakeholders in a holistic manner as well as achieve a win-win situation.

Conclusion

The value and importance of intellectual property assets is growing in today's knowledge-based economy and globalized trade. If developing countries want to

meet their development needs and benefit from growing international trade, they should protect their intellectual property assets using appropriate form of intellectual property and exploit the assets through relevant business and marketing tools.

The Ethiopian Fine Coffee Designations Trade Marking and Licensing Initiative may be cited as an example of what Ethiopia and other developing and least developed countries could do to capture intangible values and protect valuable IP assets using intellectual property to meet social, economic and development needs.

The Initiative has demonstrated the benefits of such programmes. Ethiopia will continue identifying IP assets in its export products as well as products and services having export potential, protect and strategically exploit them using the right legal, business and marketing instruments.

There is a belief that developing and least developed countries should learn from the experience of Ethiopia and embark on a programme to tap the benefit from their intellectual property assets and be a meaningful trading partner in the international market. Ethiopia's strategy has been publicly lauded and put forward as a model for other developing countries to follow. Some of the developing countries have embarked on branding their coffee. Other countries initiated programmes to brand their export products in order to capture the benefits arising from intangible values. This is a positive and encouraging development. However, it should be noted that there is no 'one-size-fits-all' approach. Appropriate tools should be used depending on the type of IP assets. Traditional medicinal knowledge, for example, may be protected using trade secrets and exploited on the basis of a confidential information and know-how agreement. Since protection and exploitation of IP assets may be beyond the capacity of low-income developing and least developed countries, strategies of establishing partnership with foreign organizations that are committed to contribute to the development effort of developing countries, including efforts for local capacity building, should be identified and carefully implemented.

Notes

- 1 This case study derives from a study undertaken by the author for WIPO, see 'The Coffee War: Ethiopia and the Starbucks Story', available at www.wipo.int/ipadvantage/en/details.jsp?id=2621.
- 2 It is believed that the reason behind the name 'Arabica coffee' originates from the fact that the Arabs introduced coffee to the rest of the world.
- 3 This includes the families of about 1 million small-holding coffee growers who are involved in coffee production.
- 4 Forest coffee, which is also known as wild coffee, is not cultivated but found in natural forests. Wild coffee is found in the southwestern part of the country in Western Welega, Ilubabor, Kafasheka, and Bench-Maji. The area covered by forest coffee is estimated at 10 per cent of the total coffee grown in Ethiopia.
- 5 Semi-forest coffees grow under forest with limited human intervention. These are located mainly in Ilubabor, Jimma, Bench-Maji, Kefa-Sheka and Western Welega. Semi-forest coffees account for about 35 per cent of the coffee production in Ethiopia.
- 6 Garden coffee planted together with cereals, fruit trees and vegetables near to the homestead is widely grown by small farmers in Ethiopia. This type of coffee farming system is found in the southern and eastern regions including Sidama, South and North Omo, Gurage, Welega, East and West Hararge.

- 7 Plantation coffee is grown in large-scale farms, run by private individuals or companies and state-owned enterprises. These plantations, which make up only 5 per cent of the country's coffee production, use modern agricultural inputs, including chemicals, fertilizers, improved high yield and disease resistant varieties and modern techniques such as pruning, stumping and planting of disease-resistant cultivars.
- 8 Washed coffee is defined under Article 2(5) of the Proclamation to provide for coffee quality control and marketing, Proclamation No. 602/2008 enacted 25 August 2008, as 'red cherry coffee, which has been pulped, fermented and washed to remove its sticky mucilage'.
- 9 Article 7(3) of the Coffee Quality Control and Marketing Proclamation.
- 10 Article 4(1) of the Coffee Quality Control and Marketing Proclamation.
- 11 Article 5 of the Coffee Quality Control and Marketing Proclamation.
- 12 This is a wholly state-owned market institution established by law, Ethiopia Commodity Exchange Proclamation, No. 550/2007, 4 September 2007. The exchange started operation in November 2008.
- 13 See Article 2(2) and 5.
- 14 Article 12.
- 15 Article 15(2).
- 16 These are small-scale coffee farmers, coffee producers cooperatives, private investors and state coffee-producing enterprises (see Article 2(19)).
- 17 These are also known as wholesalers of coffee. The suppliers collect coffee from producers or their own farm for delivery to auction centres or the Ethiopia Commodity Exchange (Article 2 (13)). The suppliers have a duty to purchase, process and transport coffee only in the area designated to them and market the same without mixing the coffee with the coffee of other agro ecologies (Article 7 (4)).
- 18 This is a state-owned enterprise with the objective of buying coffee at the market price from the interior and selling it in the auction market or the Ethiopia commodity exchange.
- 19 This state-owned enterprise is engaged in the export of coffee. Its share in total export volume has been steadily falling as a result of market liberalization policy measures taken by the government and the increasing share of the private exporters in coffee export.
- 20 These are coffee traders who are licensed by the Ministry of Trade and Industry to buy coffee at the auctions or commodity exchange, process and export it. It should be noted here that the private exporters are not allowed to buy coffee directly from farmers and suppliers but the auction markets or the commodity exchange.
- 21 Article 6.
- 22 Article 7(2).
- 23 Article 9.
- 24 Article 8.
- 25 See Article 11. Some of the producers are organized in cooperatives and cooperative unions. The latter will export the coffee produced by their members by complying with the quality inspection, grading and certification requirements of the Proclamation. The existing unions include Oromia, Sidama and Yirgacheffee coffee producers' cooperatives.
- 26 Article 6, Ethiopia Commodity Exchange Authority Proclamation No. 550/2007.
- 27 Ethiopia Commodity Exchange Authority Proclamation No. 551/2007.
- 28 Article 5.
- 29 See Article 6.
- 30 This fact is well recognized by international coffee experts and reflected in studies. Ernesto Illy of Illy Coffee, for example, acknowledged that the Ethiopian fine coffees are the best in the world. Moreover, the International Trade Center in its Exporter's Guide published in 2002, for instance, stated: 'Ethiopia produces some of the world's finest "original" coffees such as Yirgacheffee, Limu and Harar' (quoted in Petit 2006).
- 31 Harar is characterized by winy and blueberry undertones, with good body, medium and pointed acidity and pleasant mouth feel (Dessie Nuru, Former Head, Coffee Quality Inspection and Auction Center).

- 32 This type of coffee has fruity aroma, light and elegant body and an almost menthol taste. It is characterized by fine acidity, full body and floral flavour and good aroma and fragrance.
- 33 Sidamo coffee is characterized by medium acidity, pleasant taste and sweet flavour.
- 34 Starbucks, for instance, had been selling 'Sidamo' coffee using the brand name 'Sidamo' together with its other brands.
- 35 Ingredient brands are defined as 'brands that are used as one component or ingredient of another brand product or service' (Holt 2008).
- 36 The specialty coffee market, for example, enjoyed 12 per cent annual growth in the US prior to 2007.
- 37 [www.LightyearsIp; Net/scoping study](http://www.LightyearsIp.net/scoping) (2004); <http://sbs.ox.ac.uk/starbucks>.
- 38 Ibid.
- 39 Sidamo grows in Sidama, Gedeo, Borena, Kerca/Guji, Kembata and Welayta districts of the Southern Ethiopia Peoples, Nationalities and Nation Regional State and the Oromia Regional State. (Desse Nure, Coffee Quality Inspection and Auction Center, presentation made as 'Four Decades of Coffee: Research and development in Ethiopia, 1967–2007', organized by Ethiopian Institute of Agricultural Research–Jimma Agricultural Research Center, Addis Ababa, July 2007.)
- 40 Yirgacheffee grows in Gedeo, some parts of Galena, Abeya and Wenago districts of the Southern Ethiopia Peoples and Nationalities Regional State.
- 41 Harar/Harrar coffee grows in Arsi, East and West Hararge of the Ornomia Regional State.
- 42 These were Australia, Canada, the US, EU countries, Japan and Saudi Arabia. Later the list included Brazil, China, India and South Africa.
- 43 Information obtained from Hailu G/Hiwot, who discovered 'Yirgacheffee' coffee and who has been in the coffee sector for about 40 years. G/Hiwot is one of the lead coffee exporters from Ethiopia.
- 44 There is no geographical location known as 'Sidamo'. 'Harar' is a name of a city where no coffee grows.
- 45 In Ethiopia, consultations were made with officials and experts of appropriate government organizations including the Ministry of Agriculture and Rural Development, the Federal Cooperative Commission as well as private organizations such as the Ethiopian Coffee Exporters Association, Coffee Producers' Cooperatives Unions. Outside of Ethiopia, consultations were made with the least developed countries division of WIPO, the Specialty Coffee Association of America and other similar organizations.
- 46 These include the Ministries of Agriculture and Rural Development, Capacity Building and Finance and Economic Development.
- 47 Starbucks filed application for trademark registration of 'Shirkina Sundried Sidamo', serial no. 78-431419, in 2004. Ethiopia filed application for trademark registration of Sidamo in March 2005, later than the Starbucks application. Under the existing trademark law and practice, later application is unacceptable where there is an earlier application for the same or confusingly similar mark.
- 48 Note the difference in spelling between the two words. Furthermore, Ethiopia sought to register Sidamo for coffee while Sesamo was registered for grocery products. As a result there will be no likelihood of confusion for consumers.
- 49 The Australian Trademark Office refused registration of the coffee designations on the basis that the marks are not capable of distinguishing the applicants' goods from those of other traders as they are geographical names (section 4 of the Australian Trademark Act). The examiner contends that the names are Ethiopian place names associated with the production of coffee, and that as a result other traders should be able to use the trademark in conjunction with goods similar to those Ethiopia is seeking the trademark for. The Office stated that Ethiopia would need to bring substantial evidence to overcome the refusal. The examiner's opinion is inconsistent with Ethiopia's position, which is that the coffee names are distinctive both in the sense that each is associated with distinctive qualities of certain fine coffees that Ethiopia produces, and that the names are recognized as coffee brands and not as denoting geographical places in the world coffee market.

- 50 No one can hereafter register and own the coffee brands registered as a trademark in Europe, the US and Canada and in those countries where application is duly filed.
- 51 During this meeting the umbrella brand and the brands to each of the three fine designations were unveiled and the way forward was discussed. Agreement was reached that the Ethiopian side should prepare the brand guideline and circulates it for comment by the licensed distributors.
- 52 S. Savor, 'Sundried Sidamo exclusively at Starbucks: Taking a risk, Starbucks helps create new coffee, potential new revenue stream for farmers', available at <http://finanzen.net/news/newsdetail/drucken.asp?NewsNp-339209>.
- 53 Ambassador Kassahun Ayele, the then Ethiopian Ambassador to the US, wrote a letter in March 2005, to Starbucks in which he requested the corporation to withdraw its application in return for a royalty-free licence agreement.
- 54 Starbucks withdrew its application in June 2006.
- 55 Starbucks is the largest fine coffee distributing and roasting company in the world, having a presence in 38 countries and the potential to expand. It will be in the interest of the company to ensure sustainability of the supply of the fine coffee to retain its current position, realize its expansion plans as well as retain and attract its customers. The Initiative, which aims to increase and secure the income of the poor coffee growers using market mechanism, will meet the needs of companies such as Starbucks by giving incentives to the coffee producers to grow more fine coffee, maintain and enhance the quality of the fine coffees.
- 56 Starbucks claims that more than 10 million consumers a week visit its outlets in the USA. The company may be able to retain these customers and attract only when it is in a position to meet their need. This will be facilitated by selling the fine coffees using their brands. The recognition of Ethiopia's ownership of its brands and sell the fine coffee using their brands are in line with the interest of the consumers. It will help them to take the coffee of their choice. Such use will also be in the interest of the company in that it helps to ensure customers' loyalty.
- 57 The Director General of EIPO made this clear in a letter written to Jim Donald, CEO, Starbucks Corporation, on 3 November 2006.
- 58 In a letter dated 8 November, 2006, Jim Donald suggested: 'A certification program as the best form of intellectual protection. It is the internationally recognized, long established way to create and enforce intellectual property in geographic origins of products. Use of a certification program can avoid the commercial and legal uncertainty that discourage robust trade and development.' The response is based on wrong assumptions. It assumed that the names are names of geographical locations instead of coffee brands which the Director General of EIPO tried to underline in a letter written to the CEO on 3 November 2006. Furthermore, it assumed that certification marks are the best and effective form of protection of the coffee brands contrary to the position the company took while it sought for trade mark protection of an expression that included the term 'Sidamo'.
- 59 The UK House of Commons International Development Committee summoned the representatives of the Company and held a hearing on 27 February 2007. See the House of Commons International Development Committee, Seventh Report of Session 2006–2007, vol 1, June 2007.
- 60 The Director General of EIPO wrote a letter to Mr. Rob Stephen, President, and Board of Directors of SCAA in October 2006, explaining the issues and concerns raised in a statement issued by the association on 8 August 2006. As a result the association decided not to oppose Ethiopia's application. Neuform was persuaded to withdraw its opposition against the registration of Sidmo in Europe.

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9

GABON: OKOUMÉ WOOD

Thierry Coulet in collaboration with Marcelin Tonye Mahop

Introduction

Registration and protection of GIs in Gabon fall directly under the African Intellectual Property Organization (OAPI). In Gabon, the Center for Industrial Property of Gabon (CEPIG, *Centre de Propriété Industrielle du Gabon*), under the Ministry of Economy, Trade, Industry and Tourism, operates as the national liaison structure with OAPI.

For more than ten years, OAPI has been leading a policy of actively promoting GIs protection within its 16 member states, and has ambitious goals in this area. This endeavour is evidenced through the conduct of a pilot study, aiming to identify eligible products for protection within its member states. According to some of the historical reviews on the progress made by OAPI regarding the protection of geographical indications, including one review by the current director general of OAPI, four countries were involved in this pilot project that commenced in 2000, namely the Republic of Burkina Faso, Cameroon, the Republic of Côte d'Ivoire and the Republic of Guinea. Nine products from these four countries were initially identified as potentially eligible for protection as GI (Edou 2008).¹ Although Gabon was not one of the four countries concerned with the pilot study, an exercise was undertaken at the national level in Gabon that identified a number of products potentially eligible for protection as geographical indications. A list of ten products was compiled and presented to the OAPI by CEPIG in May 2010. This list was developed based on the information provided to CEPIG by the Ministry of Water Affairs and Forestry, the Ministry of Industry and the Ministry of Agriculture; one prominent product identified in this list was Okoumé wood.

Within an endeavour to pursue a programme for the protection of Gabonese products under the geographical indication scheme, CEPIG, which has a team of two in-house staff dedicated for GI matters, seems to have been encountering some reluctance for cooperation from the Ministry of Agriculture, in contrast with the

smooth collaboration with both the Ministry of Industry and the Ministry of Water Affairs and Forestry. The efforts that led the identification and compilation of the list of ten products mentioned above spanned over a period of one year. The list of products submitted by the Ministry of Water Affairs and Forestry included Okoumé wood, presenting it as the leading product for which there is a pressing need to launch a process aimed at protecting it as a GI.

Although Gabon is not, as previously mentioned, among the group of countries selected for the OAPI's pilot implementation project, it does nevertheless figure among the group of countries selected for the second phase of this project. Timing of implementation of this second phase essentially depends on when the required funds become available. This means there has not been any formal launching of a process leading to the protection of a Gabonese product as GI of the kind that is currently ongoing in Cameroon in respect to Oku White Honey (see Chapter 7). Nonetheless, OAPI has maintained the organization's interest in promoting the development of GI among its member states, which is evidenced through its supporting awareness-raising activities such as the organization of a major seminar on GIs in Libreville in December 2010.

Characteristics of Okoumé wood

Okoumé, as an endemic species of Gabon, is found in the country's wetlands, mainly in the central, the east and southern parts of Gabon, and much less in the northern and western parts of the country. Okoumé belongs to the so-called 'noble' species, distinguished mainly by its colour, which is pinkish brown to reddish brown, likely to darken when exposed to light to a mahogany-like colour. This colour is very homogeneous throughout an entire log. Although this species appears to occur largely in Gabon, some trees are reported in the continental Equatorial Guinea and in the south of Congo and in the south of Cameroon. In comparison with other tropical timber, Okoumé is a relatively soft wood, which is an important feature for industrial use, particularly in the production of veneers. Tropical timber is, in its vast majority, hard and heavy wood with a density greater than 1, which is very unfavourable for transformation and transportation especially by means of waterways.

The advantage with Okoumé wood is its density which is about 0.65, which allows it to be transported by water.² This explains the emergence of logging activities in the Congo and Ogooué basins, from where logs are transported by waterways to Port Gentil. The logging zone was subsequently extended into the centre and east of Gabon, in particular following the establishment of the railway line to Mayumba. Construction of this line has also led to development of the logging of other species that could not be transported by waterways.

The Okoumé species has a very rapid rate of natural regeneration, and its logging does not thereby require re-planting.³ An important feature of Okoumé is also its being a native logging, as opposed to planted forest logging. Among natural forests, we distinguish what is called the Okoumé-rich forest. These feature at least three feet of usable Okoumé per hectare in a total of 12–13 feet of exploitable wood.

Okoumé wood has a strong homogeneity in terms of weight, colour and, more generally, appearance. The wood also peels easily, which makes it particularly suitable for the production of veneer. For these reasons, the timber is in high demand in the plywood industry. In terms of quality, as in the case of other species, there is a classification system for Okoumé wood, comprising six categories including: (i) special quality wood; (ii) wood of sound, fair and merchantable quality; (iii) industrial choice; (iv) economic choice; (v) special timber; and (vi) wood of unacceptable quality. Homogeneity of Okoumé is confirmed by the fact that its quality can only fluctuate between categories 'fair and merchantable quality' and 'industrial choice'.

The Forest Act of 2001⁴ already aims to improve the extraction conditions of Okoumé and ensure sustainable logging practices. This law, also aiming to promote the diversification of forest use, has significantly created an entirely new context in the sector. Before its implementation, operators were not obliged to comply with any rule, and yielded larger revenues from unregulated logging rather than by using sustainable management practices. The law has eradicated this state of affairs, as it now imposes integrated management of forests, fauna and flora as well as requiring the inclusion of local populations in logging activities.

Under the rules of sustainable development stipulated by the law, logging of a concession is based on its fragmentation into harvesting sites, and the implementation of a rotation plan of the harvesting site over a period of 25 years, to allow the resources to regenerate. According to this rotation system, only 10 per cent of a concession is felled over a total period of 25 years.

The future of production, industrial processing and sale of Okoumé appears to depend to a large extent on the results of negotiations between Gabon with the European Union, as, like other African countries, Gabon is discussing a voluntary partnership agreement with the EU that will contribute to ensuring the sustainable exploitation of the resource within the framework of FLEGT, among other things.⁵ The outcome of these negotiations should lead to the adoption of specification constraints applicable to the entire industry.

Main uses of Okoumé wood

Okoumé is used for various purposes in the production of furniture, in carpentry for construction, mouldings, flooring and in the production of boards for the manufacture of the coating of prefabricated houses (this latter constitutes a particularly developed market in the US). The main use of Okoumé wood, however, lies in the manufacture of plywood. Given the technical and mechanical characteristics unique to Okoumé, as mentioned above, this wood is very popular among manufacturers, particularly peeling manufacturers. The economic crisis has affected the Okoumé market more than other species, this being due to the fact that Okoumé wood is largely used in the construction industry, especially the peeling industry. Despite it being considered, due to its low volume, as a secondary production in respect of the exploitation of the Okoumé potentials, a resin known as Okouline is also extracted from Okoumé and used in the pharmaceutical industry.

Logging, processing and local know-how

The minimum diameter of Okoumé trees to be eligible for logging is fixed by law at 60cm. Given the tree's growth rate, it can reach this diameter in approximately 40 years. The traditional cut, or DBH cut, is the diameter at a man's breast height. Today, the cut is usually at a mere 30cm from the soil, at a height where the buttress of the Okoumé is still very large.

Okoumé wood is subjected to different methods depending on the desired end product, the main processes being:

- Peeling the wood with steam for the production of sheets from the log;
- Slicing, which consists of the production of sheets cut to specific dimensions;
- Milling for the production of lumber for construction and furniture making. It should be noted that the yield in the mills reaches about 32–35 per cent, which means that waste from sawmills represents about two-thirds of the original log.

Broadly speaking, it is estimated that there is a six-month period between the extraction of the original log from the forest and the sale of the end products to the consumer.

Geographical identification of the production zone

Okoumé grows naturally in the Congo Basin, in Gabon, Equatorial Guinea, Cameroon and the Democratic Republic of Congo with more than half of its area of production occurring in the territory of Gabon. Based on its large occurrence in Gabon it is not surprising that some operators identify Okoumé with Gabon as a country. Indeed, according to the Secretary General of the Union of Industrial Foresters and Forest management Professionals of Gabon (UFIGA, *Union des Forestiers Industriels du Gabon et Aménagistes*), Okoumé is the wood from Gabon par excellence and is a species specific to the country. Okoumé represents about 50 per cent of the total timber production in Gabon, having in mind that the sector is the second highest revenue yielder in foreign exchange for the country (coming second only after oil⁶) and the leading sector for private employment. The 'forest/timber' sector today represents about 4.5 per cent of the Gross Domestic Product (GDP) of Gabon, including a percentage of some 3–4 per cent for logging and 1–2 per cent for the timber industry. This sector constitutes the only significant economic activity within the country, and thus also plays an important role in the economic and social fabric of Gabon.

The forest area of Gabon is divided into forest planning units (FPU) with a surface that can reach 200,000ha. These FPUs are in turn divided into forest management units, which are themselves sub-divided into annual logging sites,⁷ among which there is a 25–30 years' rotation plan. Gabon now disposes of about 2 million hectares of certified forest, in a total of 4.5 million hectares of certified forests throughout the Congo Basin.

With regard to the Okoumé processing activity, two main localization strategies have been implemented. The first is to establish logging sites near the resource, which means right inside the forest, close to the exploitation site. The second consists of

setting them up near ports to facilitate the shipment to export markets. This localization strategy can significantly impact upon profitability conditions around the activity because the total cost of transporting timber may account for about 30 per cent of the overall cost.

As Okoumé is very homogeneous throughout the territory of Gabon, the majority of producers interviewed considered that the only possible appellation to be given as a geographical indication would be 'Okoumé of Gabon'. However, according to some interlocutors, there would be a difference of quality from the buyers' perspective between the Okoumé product of Gabon and Okoumé produced in neighbouring countries. It should be noted that the trade name under which Okoumé is sold in several European countries, such as the UK, Germany or Sweden, and the US is 'Gaboone'. Furthermore, it appears that some timber sector companies operating in Gabon are already marketing a wood guaranteed to be '100% Okoumé of Gabon'.

An isotopic identification project for Okoumé is in progress, supported by the International Tropical Timber Organisation (ITTO)⁸ as part of efforts towards the legal certification of the origin of the wood. It is hoped that this identification would determine the exact geographic origin of a log.

Reputation of Okoumé wood on its main export markets

Recognition of Okoumé wood itself is well-established in its main export markets, Europe and Asia. The reputation seems often associated, especially in Europe, with a particular brand, promoted by its FSC certification.⁹ This feature seems particularly important in Germany and the Netherlands. Okoumé seems widely recognized as the best timber in the world for production of plywood.

Substitute products, imitation and counterfeiting risks

The main competitors to Okoumé are other woods used for veneer, especially poplar and pine. However, it seems that Okoumé is perceived to be of superior quality compared to these woods, which are more common in European markets. Meranti, a tree species of Southeast Asia, is also considered a substitute to Okoumé wood. However, Meranti wood is considered to be of inferior quality.

Ozigo wood, also found in Gabon, can also be used for the same purpose as the Okoumé wood, particularly in the production of plywood. Its lower volume and lower yield during processing, however, makes it a less preferred alternative. Furthermore, logging of Ozigo has become prohibited in Gabon, as the tree produces fruit consumed by forest elephants.

Surprising as it may sound, Okoumé production is subject to a risk of imitation, a practice already identified by the Ministry of Water Affairs and Forestry. A copy of the typical Okoumé grove can indeed be reproduced on any foundation, including another type of wood or chipboard. To substantiate this risk of counterfeiting with regard to the exploitation of the Okoumé wood, some representatives of the Ministry of Water Affairs and Forestry were surprised to discover in a warehouse in the

Netherlands an Okoumé sold under the name 'Okoumé of Morocco', a country where Okoumé is obviously not occurring naturally. This was actually Okoumé from Gabon, sold by a Moroccan company located in Gabon.

Finally, a practice becoming increasingly common is the production of panelling with an inner slice of Meranti, coated with Okoumé on both sides. It appears that these are sometimes sold as Okoumé, at prices far below the actual cost of producing Okoumé panels.

Analysis of the competitive structure

Sector analysis

With the development of the industrialization of forest exploitation, through in-country processing of timber since the late 1990s largely led by European operators, key players working in this sector in Gabon can be categorized as follows: loggers, shippers, forest industrialists and traders. The sector is heavily characterized by the presence of 'major companies', subsidiaries of international groups, operating throughout the entire process from logging on one or more licences, to industrial processing through one or more processing units, to commercializing the wood. Among these 'majors', four groups can stand out as dominant: SBL, Rougier, Precious Woods and CBG-PCBG. The sector is thus characterized by strong vertical integration, with large international groups operating from logging to marketing the processed product up to the end consumer.

The arrival of Chinese traders in the sector in Gabon has markedly impacted on the sector with the development of the processing activities, the transformation of timber into final products, in China. The impact on the business of European actors is perceived to have been felt acutely, since the products, produced in China with cheap labour end up being re-sold in foreign markets including the European market, at a very competitive price as compared to the final products processed in Europe.

According to officials at the Ministry of Water Affairs and Forestry, the industry is today slowing down. Many operators face serious difficulties as a result of the introduction of the ban on the export of un-transformed logs out of Gabon, which causes the dwindling of revenues, while operating costs, essentially fixed costs, remain the same.¹⁰ Capacity of the local industry is insufficient to absorb all national production of timber. Some operators do not have the capacity to engage in industrialization, transformation of timber as required by law, which is a major constraint in the pursuit of the government policy of industrialization of the timber sector in Gabon.

Assessment of these volumes is questionable, however, because data released by the Ministry of Forestry is based on the production figures declared by operators, which are then used by officials in the evaluation of the taxes to be paid by such operators. To avoid payment of high taxes, some operators therefore tend to declare lower figures, often declaring only what is actually sold and transported, and not the production intended for stockpiling or internal use which can be significant in volume.

The Ministry of Water Affairs and Forestry, through a recently launched project, is aiming at establishing a system of electronic monitoring of production, in the hope that such a monitoring approach will yield close-correct figures, rather than the figures declared by operators that are far from reality.

Forest management operators

More than 100 Okoumé logging companies are present in Gabon. They have concessions granted by the Ministry of Water Affairs and Forestry, and most of them engage in responsible forest management activities. Today, the exploitation of Okoumé wood is dominated by a dozen companies of significant sizes, including seven main companies, all members of the Union of Forest Industrialists of Gabon and Forest Management Operators (UFIGA). A second group consists of a dozen more companies, and is in the process of joining the first 12 in the establishment of a system of responsible logging of the resource.

The three largest companies: Rougier, Compagnie Equatoriale du Bois (CEB) and Compagnie des Bois du Gabon-Compagnie des Placages en Bois du Gabon (CBG-PCBG), a subsidiary of Joubert group, hold FSC certification.¹¹ One of them, Rougier Gabon, is considered by some to dominate the sector. According to the Secretary General of UFIGA, the market shares of key industry players in Gabon may be divided as follows: approximately 15 per cent for Rougier, 14 per cent for CEB (subsidiary of Precious Woods group) and 12 per cent for CBG-PCBG.

It is estimated that, as the timber exploitation sector is one of the main providers of employment in Gabon, the largest companies employ 350–1,700 people each. To be able to absorb this mass of employees, they operate approximately 30 per cent of the area allotted for forest exploitation in Gabon and are responsible for around 45–50 per cent of log production and more than 60 per cent of industrial production of veneers, sliced and plywood.

As previously mentioned, the largest logging companies in Gabon are all subsidiaries of international groups, mainly European, especially French, but also, more recently, Chinese. The government appears to be trying to encourage the establishment of national groups in the sector, through the promotion of small business licences with the support of the French Development Agency, which is leading a project focused on development of small forest permits. It should be noted, however, that three large Gabonese-owned companies are already present in the sector: the Equatorial Forest Logging Company, the Equatorial Peeling Society and the Equatorial Processing and Veneering Company. Another company, Industrie Bois Negoce Gabon (IBNG), active in the sawmill business, is equally of a considerable size, and controlled by Gabonese capital.

There are two types of concession: sustainable management¹² concessions, and the rest. The first cover an area of at least 50,000ha each, larger concessions may reach a surface of 600,000ha, which is the maximum area of operation by the same operator authorized by law. To overcome this limitation, however, some groups have created several companies and can log of areas up to 1 million hectares. Besides these major

concessions, there are others, smaller in size, which are exploited based on sustainable management practices and commonly referred to as ‘small licences’.

Concessions are also operated beyond the sustainable management system within the context of forest permits granted for areas not exceeding 50,000ha, usually covering 10,000–20,000ha. Finally, ‘over the counter’ permits are granted for short periods of about three months, for private use ‘family loggings’, to build houses or canoes. Commercializing the wood from this production is in principle prohibited, but nevertheless is practised on a small scale.

Box 9.1 Some integrated groups active in the timber logging industry of Okoumé wood in Gabon

Compagnie Equatoriale du Bois (CEB, Equatorial Timber Company)

The CEB, a company belonging to the group Precious Woods, has been active in the field of logging and management of the Gabonese forests for about 20 years. CEB concessions in Gabon amount to a total surface of 600,000ha. Okoumé is its main product but CEB also logs 40 other species and is seeking to further diversify its production.¹³ The main activities of CEB are as follows:

CEB society produces about 180,000m³ of logs annually. It aims to reach 200,000–240,000m³ in the next few years.

Production of cut-sawn lumber in its Bambidie factory (town of Lastourville).

This site employs approximately 400 people and the establishment of a sawmill by CEB was accompanied by the construction of an entire village, including its required infrastructure such as a hospital and a school.

Planned wood production.

CEB employs more than 600 people and, apart from the Bambidie sawmill, operates a veneer plant in Libreville and a slicing unit in Owendo. Its turnover amounts to approximately US\$200 million.

The Precious Woods Group, which owns CEB, was the first to obtain the FSC label¹⁴ in Gabon. CEB believes that the ‘premium’ attached to this certification may be assessed to additional market share of around 5 per cent. This means that certification, though an essential element of the strategy of CEB, is not profitable from a strictly economic point of view. Although not specified, the cost attached to this certification, which must be renewed each year, seems in fact much higher than the income generated by this additional market share. CEB sells its products under the brand name ‘Precious Woods’ in Europe and Asia.

Société Nationale des Bois du Gabon (National Timber Company of Gabon)

Until 1 January 2006, the *Société Nationale des Bois du Gabon* (SNBG) held the monopoly of the timber trade. Following the relative liberalization launched at

the time,¹⁵ the company activities have evolved into the industrial sector and toward commercialization of the processed wood. It is 51 per cent owned by the Gabonese Government, and 49 per cent belongs to the forest operators of Gabon.

SNBG has always held the licence to operate on its own but has never operated directly, preferring to establish agreements with various operators to implement these permits.

Following the ban on export of raw logs, the SNBG has created a processing unit in Libreville itself (Owendo) in which sawing, slicing and log-peeling operations are carried out.

Rougier Group

Rougier Group is an integrated group, operating from logging to distribution. Okoumé production represents about 70 per cent of its business in Gabon. Its main markets are in Europe. Rougier Gabon employs approximately 1,500 people in total.

In Gabon, Rougier operates a sawmill and a veneer unit, and also has a second mill under construction. Its main development strategy focuses on the expansion of its industrial operations, the development of FSC certification and the development of new markets, including Asia, where the wood could undergo a second round of processing following the initial processing in Gabon, before being re-exported to Europe.

Currently, sales of Rougier-Gabon consist 70 per cent of sales of products processed to its parent company, Rougier International, and 30 per cent of sales of logs to local manufacturers. Rougier International group has a commercial activity and sells the product as it is to European industrial operators or distributors.

It should be noted that the Rougier-Gabon group foresaw the Forestry Law's entering into force, and has had a consistent volume of processing in Gabon since 2007. Its production has slightly diversified, however, with the proportion of various woods rising within its total production figures, even though the logging of certain species has been abandoned. All Rougier Group factories are located on site, in Gabon.

Estimated production volumes

The figures mentioned here were provided by informants from various sectors including government officials, forest exploiters and international NGOs working in the forestry sector based in Gabon. They were not scientifically verified and should therefore be taken as mere estimates. Production volumes of Okoumé logs are estimated at about 800,000–1 million cubic metres per year, against the total wood production of about 2 million cubic metres in 2009, and 2.5–3 million cubic metres per year in previous years. Levy per hectare can vary considerably, from 3 to 12 or even 13 cubic metres.

Implementation of the sustainable development objectives has resulted in a reduction in production volumes and has valorized other species, leading to a diversification of the sector. This diversification is also linked to the arrival of Asian traders into the market. Until now, and historically speaking, development of Okoumé logging was clearly favoured by European operators and manufacturers, which is not the case for Asian operators.

It is important to note that the absorption capacity of factories in Gabon is estimated at an annual volume of about 1.6 million cubic metres. The logs export ban has resulted in an even steeper fall of production volumes. In 2010, the volume of logs (all species) entering the factory was estimated at 0.9 million cubic metres, of which about 50 per cent, i.e. 450,000m³, consisted of Okoumé wood; operators are no longer producing more than what they can sell to the local industries. It should be noted that Okoumé does represent roughly 50 per cent of the total timber production in Gabon, but this proportion varies greatly from one region to another.

Processing industry and small-scale processors

With regards to the transformation of timber in Gabon, this dimension of the wood industry is controlled by actors that may be categorized according to their size. Thus, wood processing is handled by international industrial operators, local players and some international actors who operate the semi-industrial level of wood processing and the small-scale processing largely operated by national actors. Industrial companies usually depend on the same groups as the large-scale forest logging companies mentioned above.

Most of the large forest operators have industrial processing units operating in Gabon. Prominent examples are Precious Woods Group and Rougier, as detailed above. But this is not always the case, and some operators are facing serious difficulties due to the ban on the export of raw timber which entered into force in April 2010. The non-integrated industry players, who are not loggers themselves, need to obtain logging concessions to secure their supplies. Although they dominate the sector, integrated operators remain a minority in the profession. The other operators are required to invest in the construction or acquisition of industrial units, which is an investment affordable only for a minority. According to some of our interlocutors, those who do not have the means will be forced to close down in the short term, either by abandoning the activity altogether, or by moving to Gabon's neighbouring countries, especially Congo and Equatorial Guinea. There is also a new business practice that emerged following the ban on export of logs: factory renting. This practice seems to be an option that mostly Chinese traders resort to, as rather than building or buying a production unit they prefer to rent an existing unit.

The processing activity itself can be segmented into three parts: first processing (sawing, slicing and peeling); second processing (the making of panels, plywood and wood flooring); and third processing (building construction and shipbuilding, carpentry and cabinetry). This stage mostly consists of industrial customers of the timber industry using the products of this sector as an intermediate consumption.

The cost of a processing plant, depending on the nature of operations, can fluctuate between 4 billion and 15 billion XAF (between roughly US\$8 million and \$33 million). This constraint was clearly acknowledged by the government as evidenced by its introduction of a VAT exemption on industrial equipment of the forest industry and a 10 per cent reduction of duties on their importation.

An important technical element of processing is its performance, defined as the ratio between the volume of processed products and the volume of raw timber that enters the processing plant. It is estimated that factors which contribute to higher performance rates include the quality of the wood, the performance of the industrial equipment and the level of training and know-how of the personnel operating the equipment.

It is worth underlining that the company Bois-Tranchés, which is controlled by SNBG, was traditionally the only company active in slicing. CEB has now also acquired a slicing unit.

Large firms in the peeling sector are Rougier, TDIB, POGAB, a company that was originally a subsidiary of French group Sofirol, bought in 2008 by Chinese investors and, more recently, by Lebanese investors. At the time fieldwork was carried out in Libreville, there was no report of any further activity carried out by this company.

According to the Ministry of Water Affairs and Forestry, the main obstacle to the development of timber in Gabon resides in the inadequacy of industrial sawing. Health problems were also identified by the Ministry, which found use of toxic products and the presence of carcinogenic dust at certain stages of processing.

Only a few companies have closed down solely due to the introduction of the ban on export of raw logs, but according to some of our sources, many have ceased operations as a combined result of this prohibition in conjunction with the international economic and financial crisis.

Few plants have been established since the introduction of this ban on the export of logs; such cases are very limited, mainly because of the difficulty in raising capital for these projects. In fact, it seems that these few newly-established plants are usually foreign-owned companies, particularly Asian, and mostly Chinese.

Funding mechanisms in the sector are deemed inefficient by many stakeholders and observers. Banks seem very cautious about engaging in this sector, apparently due mainly to market fluctuations. However, the processing industry features strong technological development particularly marked by major computerization of the management process accompanying advances in quality and productivity, the implementation of which requires considerable financial resources.

Transport and loading

The *Société d'Exploitation des Parcs à Bois du Gabon* (SEPBG) holds the monopoly in the loading of ships for transportation of wood products from Gabon.

Local carpentry

Local woodworks, or 'roadside carpentry', is a loosely structured activity, designed to satisfy a purely local market. However, this is an important pool of employment.

Sector organizations

UFIGA includes mainly the major players in forest exploitation and the timber processing industry in Gabon. Although UFIGA is historically linked to the French industrial groups present in Gabon, it also includes a Chinese company among its members (Sunly, formerly Safor). UFIGA comprises industrialized companies who practise sustainable forest management and are registered for FSC certification. This organization plays an active role in promoting this certification, with certification development in Gabon being its primary objective. The other Chinese groups form a very tight solidarity network but do not integrate with sector organization. Small-scale operators appear to face a strong lack of organization.

Price developments

The price of the Okoumé log appears to have evolved in a rather irregular manner during the past five years. After the impressive rise in 2006 and 2007, prices fell abruptly in 2008 and 2009. Historically speaking, and unlike other commodities, timber has not seen a price increase in recent years. Prices have been on the same downward trend for some time because of the global financial crisis and the housing crisis that has hit some major Okoumé markets, such as Spain, Italy and France. This has clearly been exacerbated by the discounted prices offered by companies hard hit by the ban on export of raw logs, which were facing serious liquidity problems. As a result, the offer of Okoumé wood on the markets clearly became overabundant.

Although markets are seen as fragmented and dark, and though prices vary significantly from contract to contract, the Ministry of Water Affairs and Forestry admits that it does not have a clear vision of the situation in this regard; it seems that the introduction of the ban on export of logs resulted in a sharp increase in market power of the industrial actors, as their processing capacity was much lower than the capacity of forest logging companies. Producers are also expected to be affected by a further decline or even a steep fall in prices on the domestic market due to competition becoming stronger.

Prices quoted by our various sources are quite different. Log prices are now fluctuating between 15,000 and 40,000 XAF/m³ for some, or from 80,000 to 120,000 XAF/m³ for others. Prices vary for up to triple or even more, from one company to another and from one product to another, depending in particular on whether it is a dry wood, or depending on other parameters such as the length and physical characteristics of the log including the shape and visible flaws of the log and, finally, depending on whether the wood is certified or not. Until 2006, SNBG monopolized the export of logs, and was also required to buy the entire output produced by operators; in other words, the role of SNBG was equivalent to a stabilization fund. The purchase price of the log was the tax reference price, also called the official market price, set by the State under the Financial Services Act.¹⁶

After the steep fall in prices on international markets in 2008 and 2009, SNBG stopped buying Okoumé logs completely, as international demand had virtually ceased. Prices are gradually on the increase. However, the current price is still considered low

compared to prices before the crisis, oscillating at a range of 20–30 per cent above or below the Gabon tax reference price.

According to some of our informants from the Ministry of Water Affairs and Forestry, there is a need to acknowledge the existence of speculation on Okoumé wood, deriving from Asian traders, specifically mostly Chinese, Indian and Malay, who stock up large quantities and then abruptly stop all purchases from local producers, thus forcing suppliers to drop their selling price. These traders are achieving very low selling prices from medium and small-sized producers, as they provide them with permanent liquidity by paying for their production in advance. In this way, the small size producer is strongly dependent on the trader.

With these kinds of speculative approach, most of our informants stress that the arrival of Asian traders in the market led to a sharp fall in prices.

For processed products, prices vary depending on the mill and on whether it uses industrial or artisanal production methods. The price of the sheet after peeling thus fluctuates between 100 and 1,000 XAF (US\$0.22–2.2) per square metre depending on the quality and dimensions of the sheet.

Prices for sawn wood products are generally down by 25–30 per cent since late 2008, the price of timber oscillating around 300 XAF (US\$0.66) per cubic metre today, against approximately 400 XAF (US\$0.88) before the crisis.

It must also be noted that the French timber market, which is probably the main export market for Okoumé wood, has further shrunk in recent years after the Xynthia storm, which caused the French Government to draw up a plan in support of the gravely affected timber sector of the Landes region. This certainly has had its toll on prices of raw logs and processed wood.

Market structure

Okoumé wood is intended primarily for export. The local lumber market is very limited and practically operates only with wood of low quality.

Domestic markets

As previously noted, the local lumber market is very limited and practically operates only with wood of low quality, caused by inappropriate drying. The wood of poorer quality is sometimes used by farmers and industrialists themselves for private use, including construction of housing for their employees. Beyond these niche usages, the domestic Okoumé market is very limited, partly because of the fact that the local population has a very negative perception of wooden buildings, which are seen as houses for the poor. Quality wood, which could be used for decoration, is itself too expensive for the local market. It should be noted that the informal domestic market appears to be relatively large.

For some, it seems that attitudes in Gabon are changing, a large majority of people now considering wooden buildings as a choice in the construction of houses, not as an option reserved to or only affordable by the poor. In this respect, the development of

lumber construction can be anticipated, and consequently create a more favourable domestic market for Okoumé. As a consequence of these elements, the price elasticity of Okoumé wood in its domestic market appears to be low.

Export markets

It must be taken into account that the wood's export activity in Gabon has recently been considerably upset with the newly introduced ban on export of raw logs. This ban came into force in January 2010, but with a short transition period of about three months during which some exports were allowed, making the ban practically effective from April 2010.

Europe, especially France and Greece, are the main destinations for processed Okoumé wood from Gabon. Asia, especially China, is also an important market and is rapidly growing. North America has some import activity, but is mostly supplied with tropical wood from South America. It should be noted that, although Okoumé wood is not directly exported to the US, it occasionally appears to be re-exported after processing in China. The Middle East seems to offer considerable prospects for development, as does India.

It seems that the two major potential markets in Africa, South Africa and Nigeria, are increasingly turning towards foreign suppliers: China, in the case of South Africa; Canada, in the case of Nigeria. This is attributed mainly to the presence of tariff barriers and lack of extensive commercial relations between Gabon and these countries, but also to fluctuating exchange rates and language differences.

Until now, Okoumé wood was mostly sold on export markets to processors especially for use in the production of veneers. In this sense, Okoumé peeling seems to have been a very important activity in some regions and some European countries, particularly the French region of Poitou, as well as Greece, Portugal and Italy. Peeling has also grown in China, where manufacturers then sell their veneered panels on the European market at a price about 25 per cent lower than the local manufacturers.

Europe thus constituted the main Okoumé export market for logs until the late 1990s, with a volume of about 2.5 million cubic metres exported annually. At the time, Okoumé wood represented about 60 per cent of Gabon's timber exports. China became the largest export market for logs in the early 2000s, and represented approximately 75 per cent of log exports to Asia at the time of entry into force of the ban on raw log exports, with this proportion reaching 90 per cent in the specific case of Okoumé wood. At the time, Asia itself was the destination of about 70 per cent of all total exports of wood from Gabon.

Okoumé wood is also sold to Europe and on other export markets for various industries, including the furniture, shipbuilding and automobile industry in the form of veneered sheets and sawed logs. These industries use Okoumé wood for both internal and external decoration purposes.

Major specialist distributors of construction and crafts equipment and materials are also among the major European buyers. Chinese buyers are mostly dealers who re-sell the wood in China or abroad. It should be noted that until January 2006, when the

SNBG monopoly on the export of Okoumé logs ended, export prices were determined by destination and could vary significantly from one country to the next. For China and Asia in general constituted volume markets and were characterized by relatively low prices, while Europe was traditionally a market for premium products, and thus respective prices were higher. European and Asian markets also vary considerably in terms of business practices. More specifically, Europe has traditionally been a 'species-oriented market', which means that a particular species is purchased as such, while the Asian market is a market of batches, and each batch may contain different species in varying proportions.

Competition is considered stiff on the international markets for processed products. Though Okoumé is not traded on any spot or futures market, advance selling is an established practice. There also appears to be intention to create a spot market in Libreville.

It is worth noting that the export of raw Okoumé logs was subject to duties and exit taxes as high as 17 per cent of its official market price, while no duty is imposed on the export of processed wood.

Value chain analysis

Okoumé timber is a niche market, and as such each producer, manufacturer and logger has a tendency to treat information about prices as confidential. According to some informants, trade margins from the sale of raw logs are currently higher than margins on the sale of industrial products, as European buyers and large retailers are aware of the difficulties Gabonese industrial operators are facing due to the newly established prohibition on sales of raw logs, and are putting pressure on the prices of industrial products. Nonetheless, it seems that the value chain features several bottlenecks in the industry to begin with, but, more importantly, at the level of major distributors in export markets, as these distributors have great market power.

Prices may triple from one stage of the chain to the next. This element must be balanced against the rate of yield or of loss for each stage of processing. The loss of wood could reach levels as high as about 50 per cent, for example, in the veneer activity. This rate of yield may vary depending on the species.

It must be noted that until now, Okoumé wood was exported either as raw logs or after processing, in the form of veneers or sawn/cut logs. The wood can no longer be exported in any other form apart from processed, i.e. veneer or sawed, since the entry into force of the ban on log exports in April 2010.

Advantages, disadvantages and potential problems linked to GI protection

If designation is granted as 'Okoumé wood of Gabon', all Okoumé loggers and timber producers located in Gabon are considered most likely to be covered, as long as they meet the technical specifications set out in the protection's specification criteria.

Protection of geographical indication of Okoumé wood will probably have a positive impact on its various export markets according to many stakeholders, but others consider that the potential positive impact should not be taken for granted. The eventual impact on price is considered by some producers to be the most important; apparently, the volume of sales can already be easily expanded given current demand.

According to UFIGA officials, the introduction of protection of geographical indication on Okoumé wood would probably bring very positive results to the market. This impact would most likely mostly affect industrial lumber, such as beams, battens and rafters. For the SNBG, the market effect, though potentially large, will depend on the implementation of an effective communication policy. Other sources stressed the fact that identification of a product is essential to its success in the globalized context, and that the introduction of a geographical indication would constitute the ultimate identification.

Despite the advantage for product identification, especially the identification of the origin of a protected GI that the system is most likely to benefit to Okoumé wood, which it is hoped would generate a premium in current markets, there is a feeling from forest exploiters and industrialist that a GI protection could also be a constraint to their activities. In this respect, there is risk that the same will apply for the introduction of protection of geographical indication. In this regard, the impact of the introduction of GI protection on the development of existing markets is therefore highly contested. For some, the protection of geographical indication will have no impact on one of the two main existing markets, namely the Chinese market.

It is the view of a number of actors that the impact of GI protection on Okoumé timber prices appears very random. Bearing in mind the example of FSC certification impact on prices, it is indeed very uncertain. It seems that customers are not willing to pay a higher price because the wood is FSC certified. Positive impact of this kind seems to be reserved for some niche markets in Europe. The same reasoning seems to apply regarding the impact of geographical indication protection.

One additional advantage for introducing a GI protection for Okoumé is its potential to foster cooperation among actors involved in the exploitation of this forest product. Such a strong cooperation, it is hoped, would ensure that all actors have the same commitment to respect the rules pertaining to the sustainable exploitation of Okoumé.

Funding is a major problem in the sector, as banks are very cautious towards these companies. Introducing protection of geographical indication would highly unlikely be a strong argument to change the banks' cautiousness towards timber companies, because it is not clear what direct impact GI protection would have in terms of improving the sales of Okoumé in the main markets in China and Europe for instance.

GI protection could also lead to the exclusion of some producers from the market, which is viewed positively by UFIGA officials, as it would ensure better compliance with the mandatory rules for sustainable logging, whether established under the FLEGT programme or through GI specifications. As previously elaborated, a Forestry Law already in place aims to improve and ensure sustainability of logging conditions for Okoumé wood. Geographical indication protection could be a useful tool to support this process.

The impact of protection of geographical indication on product quality and improved production processes mostly depends, for some speakers, on the benefits that the operator can anticipate. Introducing GIs protection could, however, convince the dozen of producers currently undecided on whether to proceed with FSC certification. Such a development would probably help them access those new sources of financing that they are currently struggling to find.

The reputation of the quality of Okoumé wood is already well established. However, introducing GI protection would no doubt further strengthen this reputation.

Introducing GI protection would be compatible and even complementary to the existing FSC certification. Furthermore, GIs protection would support traceability and sustainable management of the resource.

The rural development aspect has already been taken into consideration within the sustainable forest management policy currently implemented at the national level. Introducing GIs protection could probably complement and reinforce this approach, particularly among the dozen medium-sized enterprises still undecided as to whether to commit to this option.

Certification of the legal origin of Okoumé wood, currently under implementation in Gabon, is a national specificity. GIs protection could probably build on this legal certification to enhance its commercial attractiveness. The introduction of GIs protection may thus be of interest from the standpoint of forest management in Gabon, should protection be linked to strict criteria of sustainable forest management. The introduction of this requirement would also eliminate all risk of forest over-exploitation and adverse impact on biodiversity.

TABLE 9.1 Summary of potential advantages associated with the protection of Okoumé Wood Gabon GI

<i>Advantage</i>	<i>None</i>	<i>Low</i>	<i>Average</i>	<i>High</i>	<i>Very high</i>
Broad access of producers to protection		x x			x x
Improved product quality				x x	
Improvement in the production process				x x	x x
Message to the market regarding the reputation and product quality				x x	
Better cooperation between producers				x x	
Access to new financial resources		x x		x x	
Prevention of relocation					
Preventing theft of traditional know-how					
Possible combination of GI protection with other tools (e.g. organic certification)				x x	
Opportunity to sell at a higher price					x x
Development of existing markets				x x	
Access to new markets				x x	
Rural development				x x	
Protection of ecosystems and landscapes				x x	

Potential problems and disadvantages linked to GI protection

The administrative and legal complexity associated with the development of GI protection for Okoumé appears to be a genuine problem. The professional community does, however, seem ready to engage in this process, provided that the financial costs incurred do not exceed the potential benefit. Consulting firms specialized in intellectual property, such as UNNG of Libreville, also seem ready to engage in this process and are aware that it is the competent OAPI committee that will be responsible for the validation of the geographical indication and linked specifications, once the process is launched.

Within the framework of the implementation of GI protection, the preparation of the specifications could prove to be the most cumbersome step, due to limited cooperation between operators. Again, it seems necessary that government authorities play a unifying role. This phase is sensitive and complicated, requiring detailed work and close cooperation between intellectual property experts and the professional community. According to UNNG, development of these specifications could take around three months' work, involving three or four types of complementary expertise, including delineation of the geographical zone and defining the technical characteristics of the wood, such as density, shape and/or colour.

Considering the technical specifications have been designed and validated, the next step in the implementation of a GI protection is the certification of individual operators. The certification process will be done through an application process whereby individual operators would compile and submit their application as prospective users of the GI to the National Validation Commission. It is suggested that this commission be composed of representatives of the Ministry of Water Affairs and Forestry, the Ministry of Trade and intellectual property professionals. The estimated cost of compiling and filing an application is about a week's full-time consultancy work, or five man-days of consulting.

Protection of GIs would allow for criteria in terms of quality, technical and physical aspects to be included, and therefore will differentiate Okoumé wood of Gabon from wood originating from other producing countries, mostly Equatorial Guinea and the Congo. The specificity of Okoumé wood in terms of physical and mechanical characteristics allow it to be easily identified by specific biological attributes found only in Okoumé wood of Gabon.

As GIs are perceived to constitute an aspect of national heritage, the role of the government in promoting and funding the initiative is of paramount importance. In this regard, representatives of the Ministry of Water Affairs and Forestry indicate that external support, particularly from the European Union, seems necessary for both development and management of a system for the protection of GIs. Any system of certification or designation implies the establishment of a monitoring mechanism, and is likely to generate new constraints, such as the need for dedicated human resources with the relevant skills to monitor the system.

It is the view of some actors that the introduction of protection of geographical indication does not raise any problem in terms of implementing and managing an

appropriate governance structure. It should be noted that FSC certification, already in place and annually renewed, could easily incorporate the criteria for the award of a geographical indication and could issue a certificate at no extra cost. In addition, observatories are already in place in Gabon, as well as in other Central African countries, ensuring compliance with sustainable forest management, a concept that integrates sustainable management and resource conservation. These observatories could be responsible for issuing geographical indication certificates.

However, existing certification schemes, including FSC, present severe constraints for producers and industrial sector professionals, who cannot sell on some export markets unless they are certified. This certification already guarantees the legal origin of the timber and the sustainable forest management practices. The

TABLE 9.2 Summary of potential constraints and disadvantages for Okoumé Wood Gabon GI protection

<i>Disadvantage</i>	<i>None</i>	<i>Low</i>	<i>Average</i>	<i>High</i>	<i>Very high</i>
Difficulty linked to the identification of specific biological or cultural attributes of the product	x x				
Legal and administrative complexity of developing a GI					x x
Lack of financial and human resources to engage in the development of a GI	x x			x x	
Difficulties associated with the implementation and management of a governance structure appropriate for GI	x x			x x	
Inability of GI protection to significantly help small producers					
Marginalization of other important products and production in the region					
Risk of appropriation of the economic value created by protection of GIs by processors and distributors					x x
Economic exclusion on the supply side: exclusion of some producers due to the definition of product characteristics or the requirements in terms of information, security and traceability		x x			x x
Economic exclusion on the demand side: no access of local and low-income populations to traditional and/or alimentary products	x x				
Possibility of dispute over ownership of the GI, particularly between national authorities and local populations or authorities					
Risks to biodiversity conservation					x x
May distort the local culture					

introduction of the protection of GIs would therefore be another step in the same direction, and could be both an advantage and an additional constraint. Another aspect for consideration is the fact that the implementation of sustainable management on the one hand and FSC certification on the other has already burdened loggers, processors and the industry with significant costs, and the introduction of protection of geographical indication would, for some, be nothing but 'another project on the list' and an additional burden. Some representatives of the Ministry of Water Affairs and Forestry fear that certain industry players will be overwhelmed.

The most important point in this regard seems to be the concrete possibility, considered high by many, of the commercial benefit created by the introduction of protection of geographical indication being captured by certain major distributors of Okoumé wood on export markets, particularly in Europe.

Whereas the introduction of protection of GIs may actually result in exclusion of some producers, it is however considered by several speakers as a positive step to clean the sector of any form of illegal logging, and to ensure the implementation of sustainable forest management in Gabon. It should be noted that the risk of exclusion probably affects the majority of small-scale operators, who appear to lack the resources required to meet too demanding technical specifications. This category of producers will therefore necessarily need training and capacity building, to be funded by the government or other donors in order to support them in their effort to comply with the Okoumé wood GI technical specifications. Local demand is very limited, so the prospect of the protection of GIs seems unlikely to cause any significant exclusion as far as demand is concerned.

Risks of impact on conservation of biodiversity also appear to be very limited, provided that the criteria for sustainable management and biodiversity management are incorporated into the technical specifications of the geographical indication. NGOs and professional timber exploiters consider that, based on existing inventories and observations in the forest, the Okoumé tree is currently not endangered by logging.

In conclusion, many stakeholders believe that a feasibility study would be necessary to assess the benefits and constraints linked to introducing GI protection.

Other possible legal tools complementing GIs protection

There are currently two types of wood certification in Gabon: national certification for sustainable management or CFAD, and the international FSC certification. FSC certification includes environmental and social criteria, and is accompanied by the establishment of a traceability system. The cost of this certification in connection with the establishment of the traceability system is estimated at about 3,500 XAF/ha (US \$8/ha). For some, the main interest of the FSC or another label resides in marketing and sales. The FSC is required to enter certain export markets, particularly in Europe.

As previously mentioned, the protection of GI for Okoumé wood might well accompany and complement the FSC certification scheme. However, while potentially complementary to FSC, FSC certification constitutes a stronger selling

point for buyers of sustainably harvested products. FSC labels, and FLEGT voluntary partnership agreement when implemented, are tools that are deemed to ensure a 'chain of legality' of forest production, i.e. certify the legal origin of timber, the existence of a licence to operate, compliance with all rules of operation and resource management as defined at the national level. Introducing geographical indication protection could only strengthen this chain of legality.

Conclusion

A formal process aimed at achieving protection of Okoumé wood in Gabon similar to the ongoing processes launched by OAPI in Cameroon for the protection of Oku White Honey and the Penja White Pepper has not yet been launched. However, having been identified as one of the valuable natural products whose origin, quality and reputation are associated with Gabon, there is a large convergence of views among actors who hold some interests with Okoumé that such a process is needed and should be launched as soon as possible in order to protect Okoumé wood from Gabon as a GI at the African Intellectual Property Organization. The expectation that emerged from the vast majority of actors met during fieldwork in Gabon is that, considering the number of counterfeiting acts reported as being carried out on Okoumé overseas, it is urgent that the origin of Okoumé wood be legally protected. The first step is to achieve protection through Annex VI of the Bangui Agreement, after which it is suggested that actions be taken to seek protection in other jurisdictions such as the countries of the European Union. OAPI is in fact encouraged by the commitment of all the stakeholders in the Cameroon cases and hopes to replicate this momentum in other member states so that, at long last, apart from the France owned Champagne, which is reportedly the only product currently benefiting GI protection within the OAPI system, more and more products originating from member states can be counted as protected GIs.

Notes

- 1 This report indicates that among the nine products initially identified were Burkina Faso (green beans and Karite butter); Cameroon (Manioc and sugar cane); Côte d'Ivoire (Man rice and Korhogo cloth) and Guinea (Mafrenya and Naine bananas).
- 2 A more detailed factsheet on the properties, physical features and various uses of Okoumé wood is accessible at <http://tropix.cirad.fr/africa/okoume.pdf>, accessed 16 August 2011.
- 3 The growth rate of Okoumé and its re-growth capacity, especially in the coastal areas and in terms of winning savannah habitat, are among the ecological advantages of the Okoumé species (Belingard et al. 1996).
- 4 Forestry Law No. 016/2001 of 31 December 2001. The main strategic areas of the law are industrialization, development, protection of ecosystems and biodiversity, with the greater involvement of nationals constituting a transversal axis. The law sets out a period of five years for forestry exploitation to meet compliance requirements. It should be noted that some operators were engaged in the development approach advocated by the law even before its entry into force. Meeting the development criteria is however very expensive and those operators engaged in this process in the hope of a return on investment by 2012, find themselves facing serious difficulties due to the ban on the export of logs out of Gabon, in force since March/April 2010.

- 5 European Union Forest Law Enforcement, Governance and Trade. The key element of this EU forest governance scheme is indeed the signature of a voluntary partnership agreement with forest-rich countries to ensure that only timber legally and sustainably harvested is traded in the European market. For more information see: <http://ec.europa.eu/environment/forests/flegt.htm>, accessed on 19 August 2011.
- 6 It actually represented the primary source of foreign exchange of Gabon until the late 1960s.
- 7 A tax is levied by the Gabonese Government on the operation of these sites. This tax is currently at 600 XAF/ha for a planned site, 300 XAF/ha for a non-planned site and 200 XAF/ha for an unexploited site.
- 8 ITTO brings together both producing countries and consumer countries of wood. There is thus a total of 60 member states, 33 producers and 27 consumers. The organization has a representative in Latin America and another in Africa, the latter being based in Libreville, and brings together a group of ten Central African and West African States. ITTO activity covers 80 per cent of the rainforest in the world and 90 per cent of production and consumption of tropical timber. For more information, visit www.itto.int, accessed on 28 August 2011.
- 9 The Forest Stewardship Council (FSC) was established in 1993 as a not for profit organization focused on the promotion of responsible management of the world's forests. FSC has designed and implemented a set of principles and criteria that describe how forests should be managed to meet environmental, social and economic needs of society. Respect and compliance with the relevant standards within the framework of forest management undertakings can lead to the acquisition of an FSC label by responsible operators. For more information on the FSC approach to sustainable forest management, visit www.fsc.org/certification.html, accessed on 28 August 2011.
- 10 It should be noted that, although not as stringent as in Gabon, a ban on the export of unprocessed timber is equally reported to be in place in Equatorial Guinea, Cameroon and Ghana.
- 11 SBL is a fourth company currently engaged in the certification process.
- 12 Also called Forest Concessions under Sustainable Management (CFAD, *Concessions Forestières sous Aménagement Durable*).
- 13 Okoumé now represents about 80 per cent of the CEB and the company wants to reduce this figure to about 40–60 per cent over the next few years.
- 14 Forest Stewardship Council Certification.
- 15 This took the form of allocation of export quotas for each company, as a limited number of other traders (less than a dozen) also appeared on the market. It seems that this liberalization has been achieved at the request of the major operators who hoped to increase their selling prices and expand their markets. The impact of this liberalization is however difficult to assess mainly due to its close timing with the international crisis.
- 16 The Ministry of Water Affairs and Forestry through its Directorate General of Forestry, the Ministry of Economy represented by the Directorate General of Customs and the Directorate General of Taxes, in close consultation with industry representatives, are responsible for setting this official market price. Though in principle revised annually, this price has not changed since 2007.

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10

GHANA: COCOA

Edgar Tabaro

Geography

Ghana is located on the Gulf of Guinea, only a few degrees north of the Equator, therefore giving it a warm climate. The country spans an area of 238,500km² (92,085 square miles). It is surrounded by Togo to the east, Côte d'Ivoire to the west, Burkina Faso to the north and the Gulf of Guinea (Atlantic Ocean) to the south. Ghana lies between latitudes 4° and 12°N, and longitudes 4°W and 2°E. The Prime Meridian passes through the country, specifically through the industrial city of Tema. Ghana is geographically closer to the 'centre' of the world than any other country even though the notional centre (0°, 0°) is located in the Atlantic Ocean approximately 614km (382 miles) south of Accra, Ghana, in the Gulf of Guinea. The country encompasses flat plains, low hills and a few rivers. Ghana can be divided into five different geographical regions. The coastline is mostly a low, sandy shore backed by plains and scrub and intersected by several rivers and streams while the northern part of the country features high plains. Southwest and south central Ghana is made up of a forested plateau region consisting of the Ashanti uplands and the Kwahu Plateau; the hilly Akuapim-Togo ranges are found along the country's eastern border. The Volta Basin also takes up most of central Ghana. Ghana's highest point is Mount Afadjato which is 885m (2,904ft) and is found in the Akwapim-Togo Ranges. The climate is tropical. The eastern coastal belt is warm and comparatively dry, the southwest corner is hot and humid, and the north is hot and dry. Lake Volta, the world's largest artificial lake, extends through large portions of eastern Ghana and is the main source of many tributary rivers such as the Oti and Afram rivers.

There are two main seasons in Ghana: the wet and the dry seasons. Northern Ghana experiences its rainy season from March to November while the south, including the capital Accra, experiences the season from April to mid-November. Southern Ghana contains evergreen and semi-deciduous forests consisting of trees

such as mahogany, odum and ebony. It also contains much of Ghana's oil palms and mangroves. Shea trees, baobabs and acacias are usually found in the Volta region and the northern part of the country.

Demographics

Ghana has a population of about 24 million people. Ghana's first post-independence population census in 1960 counted about 6.7 million inhabitants. Although it is home to more than 100 different ethnic groups, Ghana has not seen the kind of ethnic conflict that has created civil wars in many other African countries. The official language is English; however, most Ghanaians also speak at least one local language. Ghana was inhabited in pre-colonial times by a number of ancient predominantly Akan kingdoms, including the Akwamu on the eastern coast, the inland Ashanti Empire and various Fante and non-Akan states, such as the Ga and Ewe, along the coast and inland. The Mande-Gur speaking groups in the north of the country established several Islamized states, in particular those of Dagbon and Gonja, and were the middle-men in trade between other larger sahelian Muslim states (such as Mali and Songhai) and the early Akan kingdoms, especially in the gold and salt trade. Trade with European states flourished after contact with the Portuguese in the 15th century, and the British established the Gold Coast Crown colony in 1874 (see Kimble 1963).

The ethnic groups in modern Ghana are the Akan (which includes the Fante, Akyem, Ashanti, Kwahu, Akuapem, Nzema, Bono, Akwamu, Ahanta and others) 49.3 per cent, Mole-Dagbon 15.2 per cent, Ewe 11.7 per cent, Ga-Dangme (comprising the Ga, Adangbe, Ada, Krobo and others) 7.3 per cent, Guan 4 per cent, Gurma 3.6 per cent, Gurunsi 2.6 per cent, Mande-Busanga 1 per cent, other tribes 1.4 per cent, other (Hausa, Zabarema, Fulani) 1.8 per cent (2000 census). According to the CIA World Factbook, religious divisions are as follows: Christian 68.8 per cent, Muslim 15.9 per cent, traditional African beliefs 8.5 per cent.

Ghana is a product of the merger of the British colony of the Gold Coast and the Togoland trust territory, in 1957 it became the first sub-Saharan country in colonial Africa to gain its independence under the leadership of Kwame Nkrumah. The name Ghana was chosen for the new nation to reflect the ancient Empire of Ghana, which once extended throughout much of west Africa. Ghana is a member of the South Atlantic Peace and Cooperation Zone, the Commonwealth of Nations, the Economic Community of West African States, the African Union, and an associate member of La Francophonie. Ghana is the second largest producer of cocoa in the world and is home to Lake Volta, the largest artificial lake in the world by surface area.

Legal framework for trademarks and GIs protection

The legal system is based on British common law, customary (traditional) law, and the 1992 constitution. Court hierarchy consists of Supreme Court of Ghana (highest court), courts of appeal and high courts of justice. Beneath these bodies are circuit,

magisterial, and traditional courts. Extrajudicial institutions include public tribunals. Since independence, courts are relatively independent; this independence continues under the Fourth Republic. Lower courts are being redefined and reorganized under the Fourth Republic.

In 2003, the Ghanaian parliament adopted the Reports of the Patent and Geographical Indications Bills, passed them into law¹ but indicated reservations on their effect on the sustenance and protection of local industries. The broad objectives of the Geographical Indications Act is to provide protection of geographical indications based on the concept that goods originating in a country, a region or a locality of the country should not be marketed under the original name by any manufacturer.

Papa Owusu-Ankomah, Minister of Justice and Attorney General, led its reading before parliament where he indicated that wrongful use of geographical indications is contrary to honest practices in industry and trade and is misleading to purchasers of the goods for which indications are used and persons who wrongfully use the indications obtain an unfair advantage over their competitors. He further said that geographical indications are applied to natural and agricultural products and the products of handicraft and industry, such as wood, sugar, fruits, wine, coffee, tea, tobacco, textile goods and woven goods. The minister said geographical indication, however, does not only contribute to the reputation of a product but it creates good will among consumers and can assist immensely in export promotion.²

In the debate that ensued, members said that the development needs of marketing of produce were very important under the Bill and cited Ghana's main crop, cocoa, that needed to be protected and that the Bill required a second look for the protection of local products. Cited for protection were Pito, palm wine and the Kente cloth as highly abused internationally and required to be protected under the Bill. Parliament expressed concern that products emanating from African and developing countries seem not to be covered by the TRIPS agreement and cited Kente cloth and other initiatives that have not been included in the Agreement.

Ghana substantially revised and modernized its trademark law, by the enactment of a new Act, known as The Trade Marks Act 2004. There are a number of developments that were brought about by the new Act. The Act introduced for the first time in Ghana the concept of infringement of similar goods. Also, the Act makes the act of infringement a criminal offence, liable to criminal sanction. The provisions concerning Trade Descriptions and the application of forged or fraudulent marks were incorporated in the Trade Marks Act. The Act makes it an offence to apply what is termed a 'forged trademark' to any goods or services.

In this regard, a forged trademark means any trademark that is used without the consent of the owner of the trademark. Furthermore, any trademark so nearly resembling another trademark so as likely to deceive can qualify as a forged trademark as well as making the application of a forged trademark a criminal offence. In addition, strong enforcement provisions were introduced thereby empowering the Commissioner of Customs, Excise and Preventive Service to detain goods at Customs which are imported into Ghana if they bear a forged trademark.

Provision was made for the registration of service marks. This development had been long awaited by owners of trademark rights and brought trademark law in Ghana in line with most other jurisdictions around the world. In addition, the new law specifically states that the classification of goods and services applicable in Ghana is the classification according to the Nice Agreement Concerning the International Classification of Goods and Services as last revised.

Well-known trademarks are enforceable in Ghana under this law. In particular, a trademark which is identical to or confusingly similar to, or even a translation of a well-known trademark, may not be registered by any person except the rightful owner of that well-known trademark. However, the marks can only be accorded protection if they are well-known in Ghana.

Ghana has for some time been a member of the Paris Convention. However, the previous Trade Marks Act made no provision for the claiming of Paris Convention priority and in practice, priority could not be claimed. The new Act makes provision for the claiming of Paris Convention priority rights.

Economy of Ghana

Ghana is a Middle Income Economy. Well-endowed with natural resources, Ghana has more than twice the per capita output of the poorer countries in West Africa. Known for its gold in colonial times, Ghana remains one of the world's top gold producers. Other exports such as cocoa, oil, timber, electricity, diamond, bauxite, and manganese are major sources of foreign exchange.

An oilfield which is reported to contain up to 3 billion barrels (480,000,000m³) of light oil was discovered in 2007. Oil exploration is ongoing, and the amount of oil continues to increase. There is expected to be a tremendous inflow of capital into the economy in the first quarter of 2011 when the country started producing oil that is sold through its overseas licensed counter-part GAZPROM in commercial quantities. Also the refining and sale of oil resources discovered off the Ghana coast licensed to oil giant GAZPROM has begun being monitored by the Ghana National Petroleum Company. The oil is expected to account for 6 per cent of the revenue for 2011.³

The Akosombo Dam, which was built on the Volta River in 1965, provides hydro-electricity for Ghana and its neighbouring countries. Ghana's labour force in 2008 totalled 11.5 million people. The economy continues to rely heavily on agriculture which accounts for 37.3 per cent of GDP and provides employment for 56 per cent of the work force, mainly small landholders. Manufacturing is only a small part of the Ghanaian economy totalling 7.9 per cent of GDP in 2007.

Ineffective economic policies of past military governments and regional peacekeeping commitments led to continued inflationary deficit financing, depreciation of the Cedi, and rising public discontent with Ghana's austerity measures. Ghana, however, remains one of the more economically sound countries in all of Africa. In July 2007, the Bank of Ghana embarked on a currency re-denomination exercise, from the Cedi (¢) to the new currency, the Ghana Cedi (GH¢). The transfer rate is 1 Ghana Cedi for every 10,000 Cedis. The Bank of Ghana employed aggressive media campaigns to

educate the public about the re-denomination. The new Ghana Cedi is relatively stable and in 2009 generally exchanged at a rate of \$1 USD = Gh¢ 1.4. The Value Added Tax is a consumption tax administered in Ghana. The tax regime which started in 1998 had a single rate but since September 2007 entered into a multiple rate regime. In 1998, the rate of tax was 10 per cent and amended in 2000 to 12.5 per cent. However, with the passage of Act 734 of 2007, a 3 per cent VAT Flat Rate Scheme (VFRS) began to operate for the retail distribution sector. This allows retailers of taxable goods under Act 546 to charge a marginal 3 per cent on their sales and account on same to the VAT Service. It is aimed at simplifying the tax system and increasing compliance.

Tourism is a rapidly growing sector particularly among Europeans, Americans, and other internationals connected to the Ghanaian diaspora abroad. Ghana's political and economic stability, low crime rate, and wide use of English make the country an attractive entry point to West Africa for foreigners. UNESCO World Heritage Sites including Cape Coast Castle and Elmina Castle, national parks such as Kakum National Park and Mole National Park, as well as cultural celebrations such as Panafest are major centres of tourist activity.

History of cocoa production in Ghana

In 1870, Tetteh Quarshie undertook a voyage to Fernando Po (Bioko in Equatorial Guinea). About six years later he returned to Ghana with several cocoa beans (the Amelonado). History was made and the introduction of cocoa beans to the Gold Coast (now Ghana) was to transform its economy. Hitherto, palm oil and rubber were the main crops in Ghana. In 1879, Tetteh Quarshie planted the seeds at Mampong with some success. Friends and relatives also undertook the planting of cocoa when pods were distributed to them. Soon other farmers followed suit (Ephson 1971: 64). It was only at this point that the Basel Missionaries stepped into the picture by importing large quantities of the crop into the country. From the Gold Coast, cocoa beans or cuttings were sent to other countries such as Nigeria and Sierra Leone. The export of cocoa from Ghana began in 1891, the official exported in 1893 (two bags exported). Ghana once provided almost half of world output. Between 1910 and 1980 Ghana was the world's largest exporter, although this position was later ceded due to bush fires and political instability. However, Ghana's cocoa is still of the highest quality and the country earns hundreds of millions of dollars annually from the export of the beans and processed materials. Record levels of 736,975 tonnes in 2003/2004 and 740,458 tonnes in 2005/2006.

Ecological conditions for cocoa growing

Cocoa is produced in regions within 10°N and 10°S of the Equator where the climate is appropriate for growing cocoa trees. The natural habitat of the cocoa tree is in the lower storey of the evergreen rainforest and climatic factors, particularly temperature and rainfall, are important in encouraging optimum growth. Cocoa plants respond

well to relatively high temperatures with a maximum annual average of 30–32°C and a minimum average of 18–21°C. Variations in the yield of cocoa trees from year to year are affected more by rainfall than by any other climatic factor. Trees are very sensitive to a soil water deficiency. Rainfall should be plentiful and well distributed through the year. An annual rainfall level of between 1,500mm and 2,000mm is generally preferred. Dry spells where rainfall is less than 100mm per month should not exceed three months. A hot and humid atmosphere is essential for the optimum development of cocoa trees. In cocoa-producing countries relative humidity is generally high, often as much as 100 per cent during the day, falling to 70–80 per cent during the night. The cocoa tree will make optimum use of any light available and has been traditionally grown under shade. Its natural environment is the Amazonian forest which provides natural shade trees. Shading is indispensable in a cocoa tree's early years.

Soil conditions

Cocoa is grown in a wide variety of soil types. Cocoa needs a soil containing coarse particles to leave free space for roots and with a reasonable quantity of nutrients to a depth of 1.5m to allow the development of a good root system. Below that level it is desirable not to have impermeable material so that excess water can drain away. Cocoa will withstand waterlogging for short periods but excess water should not linger. The cocoa tree is sensitive to a lack of water so the soil must have both water retention properties and good drainage.

The chemical properties of the topsoil are most important as there are a large number of roots here for absorbing nutrients. Cocoa can grow in soils with a pH in the range of 5.0–7.5. It can therefore cope with both acid and alkaline soil, but excessive acidity (pH 4.0 and below) or alkalinity (pH 8.0 and above) must be avoided. Cocoa is tolerant of acid soils provided the nutrient content is high enough. The soil should also have a high content of organic matter, 3.5 per cent in the top 15cm of soil. Soils for cocoa must have certain anionic and cationic balances. Exchangeable bases in the soil should amount to at least 35 per cent of the total cation exchange capacity (CEC) otherwise nutritional problems are likely. The optimum total nitrogen/total phosphorus ratio should be around 1.5.

Cocoa growing regions

Cocoa production occurs in the forested areas of the country Ashanti Region, Brong-Ahafo Region, Central Region, Eastern Region, Western Region, and Volta Region where rainfall is 1,000–1,500mm per year. The crop year begins in October, when purchases of the main crop begin, while the smaller mid-crop cycle starts in July.

Administration of the cocoa industry

All cocoa, except that which is smuggled out of the country, is sold at fixed prices to the Cocoa Marketing Board. Although most cocoa production is carried out by

peasant farmers on plots of less than 3ha, a small number of farmers appear to dominate the trade. Indeed, some studies show that about a quarter of all cocoa farmers receive just over half of total cocoa income (Zeitlin 2006: 4–12).

In 1979, the government initiated reform of the cocoa sector, focusing on its role in controlling the industry through the Cocoa Marketing Board. The board was dissolved and reconstituted as the Ghana Cocoa Board (Cocobod). In 1984 it underwent further institutional reform aimed at subjecting the cocoa sector to market forces. Cocobod's role was reduced, and 40 per cent of its staff, at least 35,000 employees, were laid off. Furthermore, the government shifted responsibility for crop transport to the private sector. Subsidies for production inputs (fertilizers, insecticides, fungicides and equipment) were removed and there was a measure of privatization of the processing sector through at least one joint venture. In addition, a new payment system known as the Akafo Check System was introduced in 1982 at the point of purchase of dried beans.

Formerly, produce buying clerks had often held back cash payments, abused funds and paid farmers with false cheques. Under the Akafo system, a farmer was given a cheque signed by the produce clerk and the treasurer that he could cash at a bank of his choice. Plantation divestiture proceeded slowly, however, with only seven of 52 plantations sold by the end of 1990. Although Ghana was the world's largest cocoa producer in the early 1960s, by the early 1980s, Ghanaian production had dwindled almost to the point of insignificance. The drop from an average of more than 450,000 tons per year to a low of 159,000 tons in 1983–1984 has been attributed to aging trees, widespread disease, bad weather and low producer prices. In addition, bush fires in 1983 destroyed some 60,000ha of cocoa farms, so that the 1983–1984 crop was barely 28 per cent of the 557,000 tons recorded in 1964–1965. Output then recovered to 228,000 tons in 1986–1987. Revised figures show that production amounted to 301,000 tons in 1988–1989, 293,000 tons in 1990–1991, and 305,000 tons in 1992–1993. After declining to 255,000 tons in 1993–1994, the crop was projected to return to the 300,000 ton range in 1994–1995.

In the early 1990s, Cocobod continued to liberalize and to privatize cocoa marketing. The board raised prices to producers and introduced a new system providing greater incentives for private traders. In particular, Cocobod agreed to pay traders a minimum producer price as well as an additional fee to cover the buyers' operating and transportation costs and to provide some profit. Cocobod still handled overseas shipment and export of cocoa to ensure quality control.

In addition to instituting marketing reforms, the government also attempted to restructure cocoa production. In 1983, farmers were provided with seedlings to replace trees lost in the drought and trees more than 30 years old (about a quarter of the total number of trees in 1984). Until the early 1990s, an estimated 40ha a year continued to be added to the total area of 800,000ha under cocoa production. In addition, a major programme to upgrade existing roads and to construct 3,000km of new feeder roads was launched to ease the transportation and sale of cocoa from some of the more neglected but very fertile growing areas on the border with Côte d'Ivoire. Furthermore, the government tried to increase Ghana's productivity from 300kg per

hectare to compete with Southeast Asian productivity of almost 1,000kg per hectare. New emphasis was placed on extension services, drought and disease research, and the use of fertilizers and insecticides. The results of these measures were to be seen in rising cocoa production in the early 1990s (see Osei 2007).

Ghana Cocoa Board's experimentation with privatization has created a hybrid system whereby despite all exports being controlled by the state, there are now around 25 private companies buying the crop in all the areas of the country where it is grown. After 14 years, the successes and failures of this hybrid system have been the subject of a study by researchers at the Overseas Development Institute. Competition was clearly found to have increased production levels throughout the country, yet access to credit remained one of the most important factors determining the level of competition and farmers rarely made the most of all the available options to sell their crop.

Their choice was based on the ability of a company to pay promptly in cash and thus there are only five major players on the market: PBC (formerly state-owned), KuapaKokoo (a successful farmers'-based cooperative working on Fair Trade principles), Adwumapa (a Ghanaian buying company), Olam and Amajaro (both foreign-owned companies, from Singapore and the UK respectively). Another key determining factor is the distance of the plantation from the main market, as the more remote farms more often find it easier to sell to the formally state-owned PBC (Vigneri and Santos 2007).

This hybrid scheme benefits a variety of players: the state, which maintains a monopoly on all exports and makes a substantially higher return from taxation than other cocoa regions; the traders, who compete for the purchase of higher volumes of the export crop on non-price terms throughout the cocoa belt areas; and the farmers, who are guaranteed a minimum floor price regardless of their geographical location. Researchers at the ODI therefore suggest that liberalization has been good for producers by: (i) providing farmers with more choice of buyers; (ii) delivering cash payments promptly; and (iii) maintaining stability in producer prices throughout the season. Yet the question remains for policy-makers as to the benefits of the state controlling an export monopoly and its strong presence of the public sector in the internal market and whether there should be even more liberalization and whether it is providing the right incentives for producers to develop better (and sustainable) farming practices.

Policy framework for cocoa in international trade

Despite significant improvements in the performance of the economy in the last two decades, Ghana continues to face a number of macroeconomic and structural challenges that limit the capacity of the economy to achieve sustainable improvements in the standards of living of the people. These include over-reliance on the production of primary commodities without sufficient linkages to other sectors of the economy, over-reliance on rain-fed agriculture and low application of science, technology and innovation in the various production and distribution chains. The operative as well as overriding policy initiative in relation to cocoa competitiveness is the 'Ghana Shared Growth and Development Agenda (GSGDA), 2010–2013'.

Ghana's economy is heavily commodity dependent; and thus a factor-driven economy. Hence, it is always at the mercy of the wide swings in the world market prices of its major export commodities as is cocoa which provide more than 80 per cent of its foreign exchange inflows.

In 2009, Ghana's competitive rating was 87 while the World Bank's Doing Business Report placed Ghana at 92. This confirms the difficulty that the public sector reform agenda has encountered. To grow at an average rate of 8 per cent per annum in the medium-term and pursue economic transformation, Ghana's competitiveness rating should not be lower than the average of emerging market rating, which is currently 51. Unless this is achieved, Ghana's emerging market competitors will outperform the country in global markets.

To this end, the policy thrust of the external sector is to build reserves that can cushion the economy against external shocks. In the medium term, Ghana's strategy is to build enough reserves to cover at least three months, while in the long term, the strategy is to build six months of import cover to meet the appropriate WAMZ convergence criterion. This, it is projected, will entail outward oriented policies to promote exports and attract inward direct investments.

Policy objectives

Within the framework of trade liberalization, trade policy under this framework is to be used to promote international competitiveness of domestic enterprises. The specific policy objectives are:

- Improve Export Competitiveness;
- Diversify and increase exports and markets; and
- Accelerate economic integration with other regional and/or sub-regional states.

Strategies

- Maintain competitive real exchange rates;
- Improve the import/export regime;
- Establish the Ghana International Trade Commission to deal with unfair international trade practices;
- Promote new goods and services;
- Continue to take full advantage of Preferential Access to markets, such as AGOA, etc.;
- Engage fully in multilateral trade negotiations;
- Ensure that National Trade Policy reflects ECOWAS protocols; and
- Strengthen links between industrial and trade policies.

Ghana's private sector remains uncompetitive in spite of several attempts by the government to enhance its competitiveness. The private sector under the overriding framework is expected to partner with the government and other stakeholders in the transformation of the economy through industrialization and modernized agriculture.

The private sector comprises a few large multinational companies and a very large number of micro, small and medium enterprises (MSMEs), which continuously face serious unmitigated challenges. These include: ineffective national strategic agenda; capable but non-responsive public sector; unpredictable macroeconomic conditions; unreliable and expensive infrastructural services; unpredictable legal and regulatory regimes; inadequate managerial skills; inadequate capital base; poor entrepreneurial orientation; obsolete technology; generally low productivity; and poor market access. All these obstacles have hampered the growth of the private sector and hence the centrality of the issue of Ghana's private sector competitiveness.

To address these challenges, the strategy focuses on developing a thriving private sector that creates jobs and enhances livelihoods for all. This is to be achieved by improving private sector competitiveness, domestically and globally; attracting private capital from both domestic and international sources; developing viable and efficient MSMEs; and industrial development, among others. Private sector development is one of the key focus areas under the thematic area of enhancing the competitiveness of Ghana's private sector.

Cocoa industry in Ghana

Geographical indications and the cocoa industry

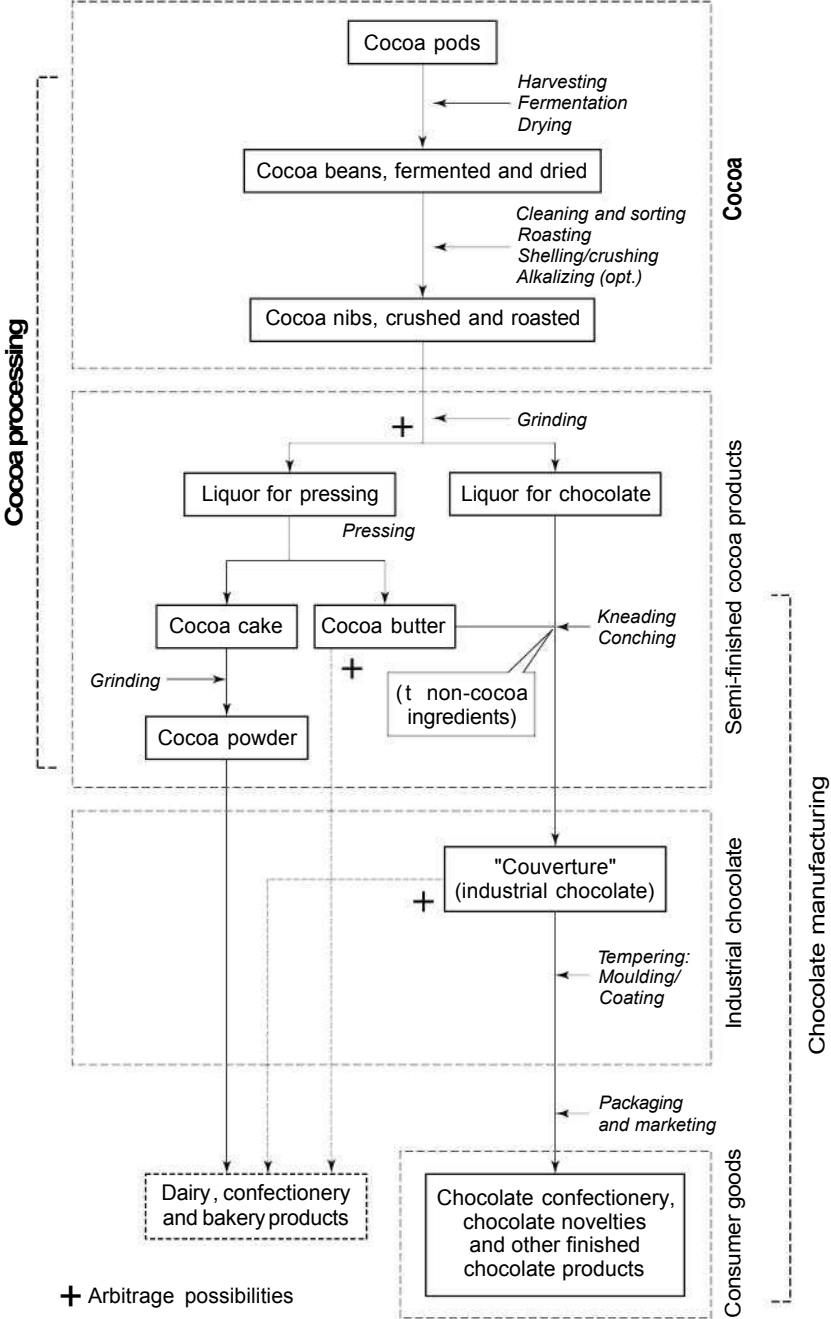
Introduction

Cocoa is particularly suitable for promotion by GIs (Hughes 2009). It has been recognized that cocoa is similar to wine in that different climate, terrain and agricultural practices produce different tastes, particularly when used to make chocolate. The most exclusive chocolates are made from the South American Arriba, Criollo and Trintario cocoa varieties, whereas so-called bulk cocoa used by industrial confectioners such as Cadbury, Kraft and Mars is usually made with the West African Forastero bean variety. The International Cocoa Organization (ICCO) using Ghana bulk cocoa as a reference since 2001 has been engaged in a project to identify the organoleptic parameters for differentiating fine from bulk cocoa. Thus far it has found

TABLE 10.1 Country Amount Produced as a Percentage of World Production

<i>Côte d'Ivoire</i>	<i>1,300 000' tons</i>	<i>37.4%</i>
Ghana	720, 000' tons	20.7%
Indonesia	440, 000' tons	12.7%
Cameroon	175, 000' tons	5.0%
Nigeria	160, 000'	4.6%
Brazil	155, 000' tons	4.5%
Ecuador	118, 000' tons	3.4%
Dominican Republic	47, 000' tons	1.4%
Malaysia	30, 000' tons	0.9%

TABLE 10.2 Matrix of Cocoa Production Value Chain



Source: UNCTAD COCOA STUDY: Industry Structures and Competition [2008].

the obromine/caffeine ratio to be a clear indicator in this differentiation. The ICCO reported that the 'project produced a spectrum of unique sensorial attributes for samples from each fine cocoa producing country that had participated in the project, concluding that the countries were not competing against each other but satisfied different flavour niche markets'.⁴

This was followed up with a project entitled 'Cocoa of Excellence: Unravelling and Celebrating the Diverse Flavour Qualities of Cocoa to Promote Market Differentiation'.⁵ The project is an initiative of Bioversity International, the French research institute CIRAD, the Salon du Chocolat and the ICCO, in collaboration with the Cocoa Producers Alliance, the Cocoa Research Unit of the University of the West Indies, the World Cocoa Foundation and the chocolate makers Barry Callebaut, Belcolade and Mars.⁶ In the project, cocoa-producing countries were invited to submit well-prepared, fermented and dried cocoa samples, representing the different genetic and geographic origins of cocoa-producing regions in each country. The cocoa liquor samples will be characterized and evaluated by an international panel using a standard methodology. The main objectives of the project are to:

- raise awareness along the supply chain on opportunities for market differentiation;
- provide global recognition to 'terroirs' and producers and of high quality cocoa;
- expose chocolate manufacturers and experienced consumers to the spectrum of flavours that exist in cocoa from different origins;
- facilitate linkages between producers of quality cocoa and manufacturers of specialty chocolate products; and
- stimulate the capacity of producing countries to search for, evaluate and produce specialty cocoa.⁷

The Project was due to conclude in March 2011. The results of this project can form a useful basis for product differentiation on the basis of GIs.

An illustration of the potential for differentiating cocoa through GIs is the project by the Government of Ecuador to seek GIs for its fine cocoa 'Cocoa Arriba'. Ecuador produces more than half of the 'fine cocoa' worldwide for which it reportedly receives a price premium of 20–30 per cent above the New York Stock exchange price (Hinzen 2009). Ecuador's significance in the fine cocoa market is attributed to ideal growing conditions across the Guayas River Valley and the fertile riverbanks of many of its tributaries. Arriba is characterized by a very short period of post-harvest fermentation, a floral aroma and smooth flavour, and enjoys a very high reputation amongst cocoa specialists (Hinzen 2009). In 2000, the Ministry of Agriculture decided to preserve the characteristics of the variety by setting up rules in a Code of Practice and applying for the GI 'Cocoa Arriba' as a denomination of origin.

The Ghana Fine Flavour Cocoa Project

Ghana is attempting to emulate the Ecuadorian example with its Ghana Fine Flavour Cocoa Project. This is a collaboration between leading cocoa researchers, farmers,

chocolate manufacturers and international aid organizations to provide superior cocoa varieties and training to Ghanaian small-scale farmers to increase their incomes and expand their livelihood opportunities. The project is part of the larger initiative 'New Business Models for Sustainable Trading Relationships' with the goal to engage civil society, farmers, and private sector partners to implement new business models that enable small farmers to participate in durable and stable trading relationships and thereby improve their livelihoods. The Ghana Fine Flavour Cocoa Project aims at developing high quality varieties of cocoa that will be recognized worldwide for superior flavour characteristics and return much of the premium to farmers. The project has been developed based on four main components:

- Identification of fine flavour varieties that can flourish in Ghana's soil and climate;
- Propagate and disseminate the identified varieties;
- Train farmers on cultivation, post-harvest and business management;
- Development of a transparent supply chain and robust market demand.

The project was initiated from the inspiration of John Scharffenberger, the co-founder of Scharffen Berger Chocolate Maker, now a brand of The Hershey Company. CIAT and the Sustainable Food Laboratory (SFL), together with implementing partners Agro Eco Louis Bolk Institute and the Cocoa Research Institute of Ghana (CRIG), The project grew from the inspiration of John Scharffenberger 'to unite the value of Ghana's world class quality control and traceability systems with superior genetic material to create a premium flavour cocoa for the world market'.⁸

The Hershey Company provides flavour evaluation and advice on the commercial viability of the varieties. Additional expertise has been provided by Mars Chocolate NA, the Cocoa Research Unit at the University of the West Indies, and Chloe Chocolat, France. As the programme enters its commercial phase, the Quality Control Division of the Ghana Cocoa Board will handle the quality inspection of the beans throughout the domestic supply chain, and the product will eventually be exported by the government's Cocoa Marketing Company to premium markets in the US, Europe and Japan.

The goals of the four-year 2008–2011 project are:

- to increase incomes of Ghanaian farmers through the direct sale of high quality fine cocoa to gourmet manufacturers;
- to build farmers' skills in the cultivation, pest and disease control and post-harvest handling of fine flavour cocoa varieties; and
- to create and document a sustainable business model based on a differentiated, premium cocoa brand for future scale-up of development benefits.

As part of this project, the Food Lab brought together a group of fine chocolate industry experts at the Scharffen Berger/Hershey facilities in December 2009 to evaluate 15 cocoa varieties selected for the Ghana Fine Flavour Cocoa project. These varieties are well known to yield cocoa with fruity and aromatic flavour notes, highly valued by

gourmet manufacturers. The flavour evaluation identified five cocoa varieties with aromatic and 'fine' flavours, of quality suited to make premium chocolate products. The Cocoa Research Institute of Ghana (CRIG) propagated 24 clones of quality cocoa varieties, which were evaluated in December 2009. The best varieties from these clones will be multiplied and scaled up over time as they are distributed to participating farmers. In addition to having access to quality cocoa germplasm, the farmers are receiving training on cultivation methods and shade management to ensure the successful growth of the fine flavour varieties. Cultivation and farm maintenance methods aim to maximize potential yield while balancing possible disease and pest pressures.

Planting material was provided to the Offinso Fine Flavour Cocoa Farmers Association in Ghana in January 2010. Thirty of their members have prepared one acre each of their existing farms for planting and grafting of the material. Sixty-four acres have been selected in Offinso for 2011 planting/grafting. If there is sufficient material, the Cocoa Research Institute of Ghana (CRIG) will select an additional 20 acres in the Tafo region.

The Ghana Fine Flavour Cocoa Project aims to harness the growth in demand for fine-flavour cocoa to create a business model that is both commercially viable and has developmental benefits for smallholders. This business model was designed to bring value to each stage of the supply chain. Commitments were secured from key actors in the Ghana cocoa value chain from farm to factory. These are outlined below:

Production: Five grower communities in the Ashanti Region are adapting fine-flavour production systems and have created their own farmer organization for management.

Technical assistance: CRIG is propagating the varieties and refining the post-harvest protocols necessary for flavour development. The Sustainable Tree Crops Program is collaborating on farmer training and cost-benefit analyses of the model.

Quality and export: The Ghana Cocoa Board and their Quality Control Division are supporting the development of the fine flavour supply chain. Discussions are ongoing with potential Licensed Buying Companies to handle the cocoa from village to port.

Marketing: Scharffen Berger and Hershey committed to purchase the initial cocoa crop harvested under the pilot project at a substantial premium over the market price.

In early November 2010, project representatives met with the Ghana Cocoa Board, resulting in a clear expression of commitment and support of the Cocoa Board. Deputy Director Dr Adu-Ampomah has formed a sub-committee comprised of the key Cocobod departments to draft strategy for steering the fine flavour program as the external investment winds down in 2011. Cocobod is interested both in the development of new varieties as well as building the capacity of (CRIG) to assess the quality of existing varieties of standard Ghanaian cocoa.

Project partners have continually informed the various Licensed Buying Companies (LBCs) in Ghana of the developing programme. LBCs such as Armajaro Ltd are interested in being supply chain partners.

TABLE 10.3 Percentage of Fairtrade Export

<i>Year</i>	<i>Fairtrade sales</i>	<i>Total sales (tonnes)</i>	<i>(tonnes) Fairtrade sales as % of total</i>
1999	450	19,139	2.4%
2000	850	32,506	2.6%
2001	400	34,388	1.2%
2002	650	37,388	1.7%
2003	1,300	37,108	3.5%
2004	1,800	62,900	2.9%
2005	2,550	40,377	6.3%
2006	2,500	32,275	7.7%
2007	4,250	35,000	12.0%

Source: Fairtrade Foundation Kuapa Kokoo Exports 1999–2007.

If this project is to be underpinned by GIs, there is the possibility for a ‘Ghana’ umbrella appellation for its cocoa, together with subsidiary appellations for the six cocoa growing regions in Ghana: Ashanti, Brong Ahafo, Eastern, Volta, Central and Western.

Case study of Fairtrade Cocoa Cooperative

A predictor for the success of GIs for Ghana’s cocoa is the Fairtrade branding undertaken by KuapaKokoo, a cocoa farmers’ cooperative organization, established in Ghana in 1993. It was formed following the government’s liberalization of internal cocoa marketing in 1992, which, farmers feared, would lead to the entry of private companies into the market with whom they would be unable to compete. The organization is often cited as a success story in the field of fair trade, its products being used in many Fairtrade-labelled products. It is the largest cooperative in Ghana, and counts 45,000 cocoa growers as members.

The Day Chocolate Company (a UK company, now Divine Chocolate) was set up by KuapaKokoo in 1997. The company uses primarily Kuapacocoa, and the cooperative also holds 45 per cent of Divine Chocolate’s stock and the rest of the stock by Oiko Credit. Today Kuapa has 45,000 farmer members in 1,100 villages, and provides 10 per cent of Ghana’s cocoa supply. Day Chocolate Company sales rose to over £5m in 2004. Between 1993 and 2004, Kuapa received just over \$2 million in extra Fairtrade premiums. Some was paid to the farmers; some of which went to projects such as the construction of four new schools (*The Economist* 2007).

Lotte ‘Ghana’ Chocolate: An indicator of the value of GIs for Ghana

The Japanese company Lotte Co Ltd has obtained an EU Community Trade Mark for “Lotte Milk Chocolate Ghana Creamy Milk and the Richness of Cacao New Standard Chocolate”.⁹ This mark is an illustration of the apparent saleability of the

Ghana name, although it also exists as an obstacle to any certification or collective mark which might be sought in Europe for the Ghana brand.

Notes

- 1 Geographical Indications Act, 2003, Act 659.
- 2 *The Hansard*, 26 November 2003.
- 3 See 'Tullow oil confirms more gas offshore Ghana', *Economy Times*, 23 January 2011.
- 4 International Cocoa Organization, Annual Report 2005/2006: 27.
- 5 International Cocoa Organization, Annual Report 2008/2009: 6.
- 6 www.cocoaofexcellence.org.
- 7 <http://ongoing-research.cgiar.org/factsheets/cocoa-of-excellence-unravelling-and-celebrating-diverse-flavour-qualities-of-cocoas-to-promote-market-differentiation>.
- 8 http://sustainablefood.org/index.php?option=com_content&view=article&id=133:fine-flavor-cocoa-ghana&catid=25.
- 9 Trademark no. 008150922.

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11

KENYA: TEA

Michael Blakeney and Getachew Mengistie

Geographical factors

Kenya is located in East Africa, lying on the equator and bordered by Ethiopia and Southern Sudan to the north, Somalia to the northeast, the Indian Ocean to the south-east, Tanzania to the south, Lake Victoria to the southwest and Uganda to the west. Relevant to the potential for agriculturally-based GIs is its physical geography and climate. From the coast on the Indian Ocean, the low plains rise to central highlands. The highlands are bisected by the Great Rift Valley and a fertile plateau lies in the east. The Kenyan highlands are one of the most successful agricultural production regions in Africa. Kenya's climate varies from the tropical coast to temperate inland areas with an arid climate in the north and northeast parts of the country. The climate is moderated by altitude. Rainfall is concentrated in two periods of the year: from moderate falls from March to May, and heavy rains, from October to December. The vegetation is dominated by savannah. Rainforest appears on the slopes of the mountains and along the rivers. In the north, the savannah fades into the desert.

Economy

Kenya has a market-based, with some state-owned infrastructure enterprises. The economy is based mainly on agricultural exports and tourism. Agriculture is the second largest contributor to Kenya's gross domestic product (GDP), after the service sector (in addition to tourism, the United Nations in Nairobi (UNON) makes a significant contribution to the economy, especially in the fields of services and construction).

The World Bank predicted growth of 4 per cent in 2010 and a potential of 4.9 per cent growth in 2011 (World Bank 2010) largely because of expansions in tourism, telecommunications, transport, construction and a recovery in agriculture. The government

is generally perceived as investment-friendly and has enacted several regulatory reforms to simplify both foreign and local investment. There are also indications that closer integration, through the East Africa Community, and attempts to improve Kenya's infrastructure are contributing to Kenya's growth momentum, although access to reliable energy supplies and port facilities at the port of Mombasa are identified as matters of importance to sustain this growth (World Bank 2010: iv). Some of the structural factors identified by the World Bank as giving 'hope for a more sustained path of growth in the next decade' (World Bank 2010: v) are equally relevant to the establishment of GIs-based industries. First, Kenya is home to a growing market of 40 million people and is becoming more closely integrated with the EAC, which offers a market of more than 130 million people, many of whom share a common heritage and language. Second, Kenya's private sector remains among the most dynamic in Africa. Thirdly, investments in transport infrastructure are reducing business costs. In 2007, the Kenyan government unveiled Vision 2030, an ambitious economic blueprint with a view of emulating the Asian Economic Tigers.

Agriculture

The agricultural sector dominates Kenya's economy. About half of the total agricultural output is non-marketed subsistence production, but agriculture is the second largest contributor to Kenya's GDP, after the service sector. The principal cash crops are tea, horticultural products and coffee. Tea and horticultural products (cut flowers) are the main growth sectors and the two most valuable of all of Kenya's exports. The production of major food staples such as corn is subject to sharp weather-related fluctuations. Tea, coffee, sisal, pyrethrum, corn and wheat are grown in the fertile highlands. Production is mainly on small African-owned farms formed from the division of formerly European-owned estates. Coconuts, pineapples, cashew nuts, cotton, sugarcane, sisal and corn are grown in the lower-lying areas.

Industry and manufacturing

Although Kenya is the most industrially developed country in East Africa, manufacturing accounts for only 14 per cent of GDP. Industrial activity, concentrated around the three largest urban centres, Nairobi, Mombasa and Kisumu, is dominated by food-processing industries such as grain milling, beer production, sugarcane crushing and the fabrication of consumer goods. There is a substantial and expanding informal sector which engages in small-scale manufacturing of household goods, motor-vehicle parts, and farm implements.

GIs infrastructure in Kenya

Trademarks are administered by the Kenya Industrial Property Institute (KIPI). The Managing Director of KIPI administers the industrial property legislation of Kenya, including the Kenyan Trade Marks Act 2002 (TMA). Under the TMA, the Managing Director also functions as the Registrar of Trademarks. The draft Geographical Indications

Bill 2010 envisages that the Managing Director will also function as the Registrar of GIs. KIPi is an instrumentality of the Ministry of Industrialization. The Ministries of Trade and Agriculture participate as stakeholders in the negotiations for a GIs law. The Ministry of Agriculture is playing a significant role in the development of certification marks and GIs for the Kenya Coffee and Tea Boards.

The TMA provides for the registration of distinctive trademarks. And, like most trademark laws, provides that a mark lacks distinctiveness when it consists of a word or words being according, to its ordinary signification, a geographical name.¹ This exclusion does not apply to certification marks or collective marks. Part VII of the TMA provides for the registration of Certification Marks. Section 40(1) specifies that a 'mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin shall be registrable as a certification trade mark in Part A of the register in respect of those goods in the name, as proprietor thereof, of that person' provided that a mark shall not be so registrable in the name of a person who carries on a trade in goods of the kind certified. Section 40(7) provides that there shall be deposited at the office of the Registrar in respect of every trade mark registered under section 47 'regulations governing their use, which shall include provisions as to the cases in which the proprietor is to certify goods and to authorize the use of the trade mark'.

Part VIIA of the TMA provides for the registration of collective trademarks. Section 40A(5) of the TMA provides that 'geographical names or other indications of geographical origin may be registered as collective trade marks or service marks'. Section 40A(1) of the TMA provides that a mark 'capable of distinguishing, in the course of trade, the goods or services of persons who are members of an association, from goods or services of persons who are not members of such association, shall on application in the prescribed manner, be registrable as a collective trade mark or service mark in respect of the goods or services in the name of such an association'. Subsection (2) provides that an application for registration of a collective trademark 'shall be accompanied by a copy of the rules governing the use of the mark'.

The First Schedule to the TMA amplifies the provisions concerning the registration of certification trademarks. It provides that an application for the registration of a mark under section 40 shall be made to the Registrar in writing by the person proposed to be registered as the proprietor thereof. An applicant for the registration of a mark under section 40 shall transmit to the Registrar draft regulations for governing the use thereof in accordance with subsection (7) of that section. The Registrar is required to consider the application with regard to the following matters:

- (a) whether the applicant is competent to certify the goods in respect of which the mark is to be registered;
- (b) whether the draft regulations are satisfactory; and
- (c) whether in all the circumstances the registration applied for would be to the public advantage.

The Registrar may either refuse to accept the application or accept the application, and approve the regulations either without modification and unconditionally or

subject to any conditions or limitations, or to any amendments or modifications of the application or of the regulations, which he thinks requisite having regard to any of the foregoing matters. The balance of the Schedule deals with advertising the application, opposition proceedings and procedures concerning the variation of the regulations of an applicant.

Kenya is in the process of drafting a Bill on GIs. Drafting commenced in 2001, with the process being initiated by the Kenya Industrial Property Institute (KIPI). Draft Instructions for a bill on the protection of GIs was prepared in 2001 by KIPI and forwarded to the Attorney General's Office for consideration. Due to other commitments the Attorney General's Office made no progress on the Draft Instructions and in 2007 they were referred back to KIPI for further consultations with stakeholders in order to incorporate changes that might have been necessitated by the passage of time. In 2009, a 'Bill for The Geographical Indications Regulations together with associated Drafting Instructions were published' (Bocedi 2010: 9) and the comments of KIPI were communicated to the Attorney General's Department. These comments were considered by the Attorney General's Department which on 17 December 2010 issued the Geographical Indications Bill 2010. It is envisaged that, subject to any further comments by stakeholders, this will be presented as a Government Bill when the Parliamentary schedule is favourable.

Section 2 of the Bill defined 'geographical indication' as 'an indication which identifies a product as originating from a territory, or a region or locality where a given quality, reputation or other characteristics of the product are exclusively or essentially attributable to its geographical origin'. Under regulation 5(3)(b) of the Regulations accompanying the Bill, 'geographical origin' is described as a 'geographical environment and the natural or human factors'. Products are defined in section 2 as including 'natural, agricultural, food and handicrafts', which makes the GIs protection envisaged in the Bill wider than that provided in the EU regulations.

Although the Bill provides for the registration of GIs, section 5(1) provides that protection is available regardless of registration. However, section 5(2) provides that registration under the Act shall be sufficient proof that the indication is a geographical indication within the meaning of section 2. Section 8 includes among eligible applicants for GIs protection, associations of producers within the relevant geographical area. Section 9 sets out the particulars that have to be filed with applications. These include the depiction of the relevant geographical area, and the quality, reputation or other characteristic which is attributable to its origin. Section 15 requires that in the labelling of products, reference should be made to 'registered geographical indication'.

Section 33 of the Bill provides for the protection of the GIs of those countries with which Kenya has concluded an agreement.

As the Kenya Government's current legislative agenda is crowded with constitutional issues and GIs is going to be fairly low down as a legislative priority, it is envisaged that the Bill will be introduced as a Private Member's Bill in 2011 by Charles Mureithi, a tea farmer and member of the Kenya Parliament's Committee on Agriculture.

Domestic registration history of Kenyan geographical marks

A Survey of the Trade Marks Register administered by KIPI indicates that to date the following have been registered as certification marks under the TMA: 'Echuchuka' was registered on 25 September 2006 as a collective mark in class 3 for detergents, cleaning preparations, soaps, perfumery, essential oils, cosmetics and hair lotions/shampoos.² The applicant for registration was the Turkana Bio Aloe Organization (Tubae), located in Loima in Turkana District. The group has 30 members, 25 women and 5 men, involved in production of Aloe (*aloe turkanensis*) products (lotions, soaps and shampoos). 'Echuchuka' means 'aloe' in the Turkana language. The rules filed with the trademark application forbid the use of the mark by anyone outside Tubae. Membership of Tubae is available to any organized and registered aloe group in the Turkana districts of the Rift Valley. The producers of these products are former herders in northern Kenya who are seeking a new way to make a living as erratic weather and frequent droughts brought on by climate change are making their way of life hard to sustain and the hot and arid lands of northern Kenya support very few crops.³ Thus far the products have been sold locally.⁴

Coffee Kenya was registered as a certification mark by the Coffee Board of Kenya on 25 November 2005 in class 30 for red cherry coffee, parchment coffee, clean coffee, roasted and ground coffee.⁵

The rules for the use of the mark require, *inter alia*, that the consumer coffee packets and containers bearing the mark must contain 100 per cent coffee produced in Kenya and that the Kenya coffee branded with the mark of origin must be manufactured according to the Coffee Industry Code of Practice, subject to certain exceptions, and comply with packaging standards specified by the Coffee Regulations of the Coffee Act.

The Tea Board of Kenya (TBK) obtained registration on 15 April 2009 of a certification mark in classes 16 (printed matter), 25 (clothing and footwear) and 30 (tea) for the 'Mark of Origin'.⁶ Requirements for Use of the Mark of Origin are:

- 1 The use of the mark of origin shall be granted solely by TBK upon satisfying the requirements as per the management system of certification (SOP to be developed).
- 2 The consumer tea packets and containers bearing the mark must contain 100 per cent tea produced in Kenya.
- 3 The Kenya tea branded with the mark of origin must be manufactured according to the Tea Industry Code of Practice (KS 2128). Exceptions may be made for tea grades necessary for production of tea bags or meeting specific market demand. However in all cases, item 2.2 MUST apply.
- 4 The Tea Packets and Containers using this mark shall be of the quantity specified in the Tea Regulations 2008 of the Tea Act.
- 5 The tea packets and containers bearing the mark must conform to the standards for packets and containers for respective markets and where the standard is not specified, Kenya standard for tea packets and containers (KS 1927:2005) shall apply.
- 6 The packets and containers bearing the mark of origin must be packed in premises registered by the Tea Board of Kenya.

The first collective mark registered in Kenya is that for Maasai/Masai registered on 25 August 2010 by the Maasai Community Trust in classes 14 (jewellery, precious stones), 18 (leather products), 24 (textile and textile goods, beds and table covers), 25 (clothing and footwear) and 41 (education, provision of training, entertainment, sporting and cultural activities).⁷ The Regulations governing the use of the mark states that it will be used as a collective mark of guarantee that the products are an authentic product of the Maasai/Masai people. The objectives of the registration, in the first instance, are to ensure that the collective mark is not used in a manner that is offensive to the Maasai/Masai community and secondly to build the capacity of the community to manage and govern its natural resources, environment and products through, *inter alia*, licensing arrangements and the policing of the unauthorized use of the mark. The Regulations provide that the collective mark shall only be used with products that are of Maasai/Masai origin or otherwise connected with the community and they establish a procedure under which applications can be made for a licence to use the mark. Arguably, the Maasai/Masai collective mark is a geographical mark because of the association of the community with Kenya. It must also be acknowledged, that because of the substantial Maasai/Masai community in Tanzania, that country might also be able to establish its rights to this geographical mark.

Swiss-Kenyan Project on GIs (SKGI)

In January 2006, the Kenya Industrial Property Institute (KIPI) sent a proposal for a technical cooperation project in the field of GIs to the Swiss Institute of Intellectual Property (IPI). Following a feasibility study by an external consultant, the IPI Board of Directors in December 2007 approved a proposal for the Swiss-Kenyan Project on Geographical Indications (SKGI). This project sought to strengthen the economic success of Kenyan products by identifying Kenyan GIs which would enable them to fill new market niches and to achieve higher profits across the entire value-chain. The project also supported the establishment of a functioning GIs protection system in Kenya and to support the country in raising awareness on GIs within EAC member states.

Project outputs were sequenced into three main phases: In Phase I, the project was to provide expert input to KIPI in order to draft a comprehensive and coherent national GI legislation, support KIPI staff in establishing capacities in the area of GIs and focus on creating national support for a national legislation on GIs. Phase II was scheduled to start as soon as Phase I was successfully completed (i.e. GI-Instructions on a draft bill in place, expertise in the field of GIs at KIPI, support of all stakeholders). It was to focus on the identification of pilot GIs and to provide expert input to preparing registration documents for certain pilot GIs.

Phase III was to start after the successful completion of Phase II, with the development of Kenya into a regional GI pioneer country within the EAC, through the support of GI registration and administrative procedures at KIPI. Secondly, activities within EAC were to take place in raising the awareness of GI protection among Kenya's neighbouring countries.

In parallel with the technical cooperation project, a bilateral agreement on the mutual protection of GIs between Switzerland and Kenya will be negotiated.

The project officially started in January 2008 and was completed in December 2010.

The project objective was to make a key contribution to the establishment of a functional GI-protection system in Kenya and to support the country in raising awareness on GIs within the country and the East African Community. At the end of the project, a Kenyan GI Bill and respective GI Rules had been prepared and a series of capacity building activities and public events were undertaken in order to raise awareness among potential producers of GIs.⁸ A pilot study was conducted to identify products for possible GIs protection.

Kenya's 'Friend of GIs' status

Kenya has been the leading advocate in Africa for effective protection for GIs at the national and international level for more than 20 years. Prior to the Seattle WTO Ministerial, a submission by Turkey in July 1999 had proposed the extension of the special protection in Article 23 of TRIPS for GIs for wines and spirits to other products.⁹ Kenya on behalf of the African Group endorsed this Turkish proposal and requested that the protection of geographical indications be extended 'to other products recognizable by their geographical origins (handicrafts, agro-food products)'.¹⁰ In the subsequent long-drawn-out negotiations on this subject in the TRIPS Council, Kenya has joined with a number of like-minded countries in an informal group 'Friends of GIs' to 'get a clear mandate confirming negotiations on extension as part of single undertaking of the Doha Round'.¹¹

Tea industry case study

Introduction

Black tea accounts for around 75 per cent of global production and more than 90 per cent of the market in Western countries. Black tea results from leaves that are fully oxidized, while green tea leaves are steamed, rolled and dried without any oxidation. Most green tea is grown in China. Tea is grown in 36 tropical and semi-tropical countries, 21 of them ACP countries. The six largest producing countries China, India, Kenya, Sri Lanka, Indonesia and Turkey (in that order) account for around 80 per cent of world output. Less than half of production is exported, as China and India, in particular, are major consumers as well as producers.

Global tea production reached 3,832,650 tonnes in 2008, a rise of less than 0.3 per cent over 2007. China accounted for 32.8 per cent of world output in 2008, followed by India with 24.1 per cent and Kenya with 9.0 per cent. The leading exporters of tea in 2010 were: Kenya (22 per cent), Sri Lanka (19 per cent), India (10 per cent), China (19 per cent), Vietnam (7 per cent), Indonesia (5 per cent) and others (18 per cent).

A small number of companies dominate the tea industry. They have a presence at almost all stages of the journey of tea from tea bush to tea bag or packet. The companies either grow tea on estates, or buy tea at an early stage of production, and

TABLE 11.1 Tea production

<i>Main world producers</i>	<i>Production in 2008 (tonnes)</i>
China	1,257,384
India	922,205
Kenya	345,800
Sri Lanka	318,470
Turkey	198,046
Indonesia	150,851
Malawi	46,000
Uganda	44,923
Tanzania	34,800
Zimbabwe	22,300
Rwanda	19,000
World total	3,832,650

usually carry out the high-value-added blending and packaging (which account for 80 per cent of the retail price), at facilities in the EU and other Western countries. The largest of the companies, Unilever, grows 35,000 tonnes of tea a year on its estates in Kenya, Tanzania and India, and buys and sells a much larger quantity, 290,000 tonnes, from other estates and sources. Its major brands, which include Lipton, PG Tips and Red Label, are available in more than 100 countries. James Finlay has tea estates in Kenya, Uganda and Sri Lanka, growing and manufacturing more than 50,000 tonnes of tea a year. It is also one of the world's largest tea trading companies.

The Tata Tea group is the world's second largest global branded tea operation with a presence in more than 60 countries. The prominent companies in the group are Tata Tea and the UK-based Tetley group.

Tea is mainly sold by auction. There are two auction centres in African ACP countries: Mombasa, Kenya and Limbe, Malawi. A rival to the African auction centres, the Dubai Tea Trading Centre, was set up in 2005.

Kenya accounts for more than half of the tea output in ACP countries and remains the world's largest tea exporter. Malawi, Uganda and Tanzania are the next largest ACP producers, with Malawi's production just over one-eighth of Kenya's.

There is no single world price for tea but rather differing prices at different auctions. Between 1970 and 2002, the price trend was downward, with World Bank figures suggesting that tea prices fell by 44 per cent in real terms over these years. Prices have since bounced back, more than doubling between 2002 and September 2009. They rose from US\$1.54/kg in 2003, to \$2.38/kg in 2008, and to \$3.18/kg in September 2009. The rise was due to droughts in Sri Lanka and Kenya and also to increased demand.

The Managing Director of the Tea Board of Kenya (TBK), Sicily Kariuki, reported in January 2011 that favourable weather and currencies boosted Kenya's 2010 tea crop by 27 per cent over the previous year to a record 399 million kilograms and export earnings increased by 40 per cent to 97 billion shillings, taking export earnings past horticulture, which brought in 78 billion shillings. In 2009, Kenya produced 314

TABLE 11.2 FAO composite prices

<i>Year</i>	<i>US cents/kg</i>	<i>Annual growth rate</i>
2003	152	2.7%
2004	166	9.2%
2005	164	-1.2%
2006	183	11.6%
2007	203	10.9%
2008	238	18.2%
2009 (September)	318	33.6%

Source: FAO 2008a

million kilograms that earned 69 billion shillings. The average price for tea sold at the Mombasa auction rose slightly to \$2.75/kg in 2010 from \$2.72/kg in 2009. Ms Kariuki predicted that production would probably fall to 360 million kilograms in 2011 due to unreliable rainfall.

The volume of Kenyan tea sold through Mombasa Auction during the month of May 2010 was 33.1 million kilograms, which was 47 per cent higher than the 15.6 million kilograms sold during the same period in 2009. The average auction price for Kenyan tea was higher at US\$2.89/kg compared to \$2.36 recorded during the same period of 2009.

Tea production in Kenya

The main tea growing areas in Kenya are situated in and around the highland areas on both sides of the Great Rift Valley and astride the Equator within altitudes of between 1,500m and 2,700m above sea level. The main production areas are Mount Kenya, the Aberdares, and the Nyambene hills in the Central Kenya and the Mau escarpment, Kericho Highlands, Nandi and Kisii Highlands and the Cherangani Hills. The tea-growing regions in Kenya are endowed with the ideal climate for tea: tropical, volcanic red soils and well-distributed rainfall ranging between 1,200mm and 1,400mm per annum that alternates with long sunny days, contribute to these favourable conditions. Production goes on all round the year with two main peak seasons of high crop between March and June and October and December, which coincide with the rain seasons. Kenya tea is grown free of agrochemicals because the ideal environment in which the tea is grown acts as a natural deterrent to pest infestation and diseases.

Kenya's teas are made from the upper two leaves and a bud. The young shoots are hand-picked in regular cycles ranging from seven to 14 days. Kenya teas are mainly manufactured using the 'cut, tear and curl' (CTC) method to ensure maximum cuppage per unit weight. Clonal planting materials have been developed by the Tea Research Foundation of Kenya (TRFK), resulting in high-yielding well-adapted varieties. The selection of planting materials is enhanced by mapping the genetic and environmental conditions; where genotype environment interaction trials are carried out as useful selection criteria for determining clonal genetic potential and adaptation so as to match the clones to specific areas where productivity can be maximized. The TRFK has developed about 50 varieties.

The tea industry in Kenya is comprised of two distinct sectors: the plantation sector of large-scale tea producers occupying 52,000ha and the smallholders' sector of more than half a million growers who are located across tea-growing areas in the country, occupying 95,000ha. The small holder sector factories are managed by the Kenya Tea Development Agency Ltd (KTDA), which operates 58 factories, compared with the plantation sector which operates 38 factories. Tea contributes 4 per cent to the Kenyan GDP and contributes 22 per cent to foreign exchange earnings. It provides a livelihood to more than 3 million persons (10 per cent of the population).

Unique characteristics of Kenyan tea

Kenya tea has certain advantageous characteristics that cannot be replicated elsewhere, which can form the basis of GIs protection:

- 1 Kenya tea is free of pests and/or diseases. This means that Kenya tea is produced without use of any agrochemicals. The only non-natural additive is the fertilizer that is used to replenish the soils.
- 2 Kenya tea is grown along the Equator which means that the tea receives 12 hours of sunlight throughout the year.
- 3 Kenya tea is grown in areas of altitude between 1,500m and 2,700m above sea level, receiving 1,200–1,400mm of rainfall annually, which is spread throughout the year. This makes the supply of Kenya tea consistent throughout the year both in quantity and quality.
- 4 Kenya has about 50 varieties of tea, which are developed to suit the seven tea-growing regions.
- 5 Kenya tea is rich in anti-oxidants which has appeal for health conscious consumers. New varieties are being developed to enhance the chemical properties of the product.
- 6 More than 90 per cent of tea from Kenya is hand-picked, compared with other producers where the tea is machine-picked. Only the finest top two leaves and the bud are used for tea production. This explains the excellent cuppage and aroma of Kenyan teas.
- 7 Over the years, Kenya has developed advanced skills in tea production producing high-quality tea. Its tea factories/producing facilities are certified with the internationally acclaimed standards (ISO 22000).

Tea exports

Kenya tea export volume for the month of May 2010 was 31.0 million kilograms, 38 per cent higher than the volume recorded in May 2009, which stood at 22.4 million kilograms (Tea Board of Kenya 2010). During the month, Kenya tea was exported to 37 market destinations worldwide compared to 31 destinations the same period of the previous year. Egypt continued to maintain the leading position for Kenya tea exports, having imported 7.3 million kilograms, which accounted for 24 per cent of the total export volume. Other key export markets were Pakistan, which imported

5.7 million kilograms, Afghanistan (3.9 million kilograms), the UK (3.7 million kilograms) and Sudan (1.9 million kilograms). The five traditional export destinations accounted for 74 per cent of Kenya tea export volume while the rest of the markets accounted for 26 per cent. During the month of May 2010, all the five traditional markets recorded significant growth in Kenya tea exports compared with the same period of 2009, with Afghanistan recording the highest increase at 74 per cent. Pakistan and Egypt recorded a growth of 59 per cent and 58 per cent respectively, while the UK and Sudan registered the least growth of 3 per cent each. Higher export volume for Kenya tea was also recorded in most of the other markets.

The United Arab Emirates emerged as one of the fastest growing destinations for Kenyan tea in 2010 with a 73 per cent jump to 22.2 million kilograms attributable to incentives such as 60 days free warehousing, an efficient port and good infrastructure, which has made it an attractive blending and redistribution location.

As is indicated below, almost all of these exports are of unbranded tea for blending. If GIs are to be introduced, this will be initially for niche market purchasers.

Administration of the Kenya tea industry

The Tea Board of Kenya (TBK), established in 1950 under the Tea Act (Cap 343) of the laws of Kenya, is mandated to regulate the tea industry in all aspects of tea growing, research, manufacture, trade and promotion in both the local and the international markets. The Board also disseminates information relating to tea and advises the government on all policy matters regarding the tea industry through the Ministry of Agriculture. The Board regulates and controls the cultivation of tea; registers tea growers and management agents. It also licenses tea manufacturing factories and regulates and controls the method of manufacture. To assure the local and international markets of sustained safety and quality of the Kenya tea, the Board conducts continuous tea factories compliance audits on tea regulations and guidelines as well as on aspects of good agricultural practices (GAPS), good manufacturing practices (GMPS) and best practices.

Among the key national legislation areas for compliance in safety and quality include:

Environmental Management and Coordination Act 1999 on Production, Processing and Handling of Tea.

Occupational Safety & Health Act (OSHA), 2007 (Certificate of Registration of a Work Place).

The Food, Drug and Chemical Substances (Food Hygiene) Regulations (Cap 254) for the factory and factory staff handling tea.

Kenya Standard KS:459, Standard for Potable Water.

Kenya Standard KS 40, Standard for Labelling of Pre-packaged Foods.

Kenya Standard KS 1927, Standard on Specifications for Tea Packets and Containers.

Kenya Standard KS 1972, Standard on bulk packaging of tea for safety, quality and integrity.

Kenya Standard KS 65, Standard on Black Tea Specifications.

In addition, the Board encourages the tea factories acquire the ISO certification standards in:

ISO 9001: 2008 in Quality Management Systems.

ISO 22000 in Food Safety Management Systems.

ISO 14000 in Environmental Management Systems.

The Board may vary, cancel or suspend any licence issued to a company if the terms and conditions of the licence are violated. The Board monitors compliance on all aspects of tea regulation and control of cultivation and manufacture of tea. The TBK is thus in a good position to coordinate a GIS system for tea.

To date, the Board has licensed 62 smallholder-owned factories managed by Kenya Tea Development Agency Ltd and 39 private estate companies. Before issuing of licences, the Board ensures that no manufacturing over-capacity is created in any tea catchment area, and that any new manufacturer has more than 250ha of mature tea bushes to run the factory. The Tea Research Foundation of Kenya (TRFK) is the technical arm of the TBK. With a mandate to carry out research on tea and advise growers on the control of pests and diseases, improvement of planting material, general husbandry, yields and quality.

The Kenya Tea Development Agency (KTDA) Ltd, incorporated as a private company in June 2000, currently manages 58 tea factories in the smallholder sub-sector serving more than 500,000 growers.

The Kenya Tea Growers Association (KTGA), established by large-scale tea producers, promotes the common interests of the members in the cultivation and manufacture of tea and to promote good industrial relations and sound wage policies for the workers. The plantation sub-sector maintains 39 tea factories.

The Kenya Union of Small Scale Tea Owners (KUSSTO) is a registered tea farmers' organization whose main objective is to look after the welfare of small-scale tea farmers.

The East African Tea Trade Association (EATTA) brings together tea producers, brokers, buyers and packers and is the auspices under which the Mombasa Tea Auction is conducted. Its primary functions are to:

- Promote the interests of the tea trade in Africa;
- Foster closer working relations among members;
- Establish facilities for the orderly sale of teas of African origin in a centralized format in the international auctions at Mombasa;
- Facilitate the settlement of disputes within the trade;
- Collect and circulate statistics and trade information and to maintain such records as may be of assistance to members in the conduct of their business affairs; and
- Act as a link between the trade, governmental and other related bodies.

The mandate of the Kenya Ministry of Agriculture is to promote and facilitate production of food and agricultural raw materials for food security and incomes; advance agro-based industries and agricultural exports; and enhance sustainable use of land resources as a basis for agricultural enterprises.

Tea production in Kenya

The history of tea in Kenya dates back to 1903 when a European settler, G. W. Cain, introduced the first tea plants in Limuru area of Central Kenya. The early settlers and the colonial government restricted tea and coffee growing to large-scale farmers and multinationals, ostensibly to maintain quality. With Kenya's independence in 1963, land reforms opened tea growing to local farmers. Currently there are about 500,000 small-scale tea farmers in Kenya. Pursuant to national tea legislation they are under the control of KTDA. This arrangement has some implications for GIs protection of Kenyan tea. Currently small-scale farmers account for 60 per cent of all the tea produced in Kenya, the balance is produced by the large-scale tea plantations under the control of multinationals. However, the returns to the small-scale farmers have historically been much lower than that for the plantations and other big producers. This is attributed to 'the high management fees charged by KTDA, the many taxes imposed on small scale tea farming, the high cost of production, the long and inefficient supply chain and general mismanagement' (CPDA 2008: 7). Although both the KTDA and the estate tea fetch similar prices on the world markets, the participation of many players who have to get a share and management problems along the KTDA supply chain reduce the payments to small-scale farmers. Criticism has been made of the management fee charged farmers by the KTDA, its charges for fertilizer and of its factory building programme of the KTDA funded by loans borne by the farmers. The commission paid out to tea brokers by KTDA are deducted from tea payments to the farmers, who play no role in the setting of commission rates. Consequently a large proportion of earnings end up being used at the KTDA level instead of directly benefiting farmers. As a consequence of this situation, the average return to the small-scale farmer has remained very small with tea factories paying an average of US\$0.21/kg of green tea leaf collected from those farmers, whereas Kenyan tea has fetched an average of US\$1.72/kg on world markets in the last eight years. The utilization of GIs will come with organizational and certification costs, as well as promotional expenses. Given the other overheads which the small-scale farmers are carrying, their enthusiasm for a GIs approach to the production and marketing of tea would no doubt be conditional upon these costs being covered through increased revenues.

A problem with increasing the amount which can be paid for small-scale producers is the fact that tea is a very perishable commodity both before and after processing. Producing high-quality tea relies on smooth transport and other infrastructure networks to get the tea quickly to and from the processing factories. The green tea leaf cannot be stored for longer than six hours without damaging its quality, and it is recommended that there is a maximum of three hours interval between plucking and processing for good quality tea. The fact that smallholders grow their tea in geographically dispersed areas obliges them to sell to whichever buyer can process it relatively quickly.

The private companies involved in the production of tea attain higher returns because they are able to attract economies of scale and employ good business practices. They would also be the beneficiaries of any increased revenues from the utilization of

GIs in tea marketing. A means must be devised for cost sharing between the small-scale farmers and the plantation sector.

Marketing of Kenyan tea

The construction of a GIs system for tea in Kenya has to take into account the way in which tea is acquired, processed and marketed, as well as the international tea trading system. The tea supply chain for small-scale farmers, depicted below, has 12 cost centres that share the revenue generated from the sale of tea. Tea is acquired from small-scale farmers by factories in the areas in which the tea is grown. Value addition on tea starts at the factory where processing and grading are done. After grading, most of the tea is sold in bulk, either directly or through auction.

The Mombasa tea auction absorbs 75 per cent of the tea crop of Kenya, the Kenya Tea Packers limited (KETEPA) takes 7 per cent of the tea, direct sales (overseas and local) takes 15 per cent and factory door sales takes 3 per cent of total produced tea. There are six auction centres in India, and one each in Sri Lanka (Colombo), Indonesia (Jakarta) and Bangladesh (Chittagong). Chinese tea is sold at commodity fairs in Guangzhou.

There are 12 registered companies who operate as Tea Brokers at the Mombasa Tea Auction. They facilitate the sale of tea on behalf of producers. Their primary functions are to taste tea for the purpose of quality verification and price setting for the respective tea qualities. The tea brokers would obviously have to be appraised of the establishment of a GIs system for tea, so that the various designations can be priced for sale.

A smaller African tea auction operates at Limbe, Malawi. Recently, the Dubai Tea Trading Centre was established, which trades and processes teas from 13 producing countries, including Kenya, Malawi, Rwanda, Tanzania, Zimbabwe, Ethiopia, as well as India, Sri Lanka, Indonesia, Vietnam, Nepal, China and Iran. The centre serves the Middle East, one of the most important markets for Kenya's teas. The Centre is reported to be considering the launch of a tea futures market.

The current revenues received for tea are less than 3 per cent of the consumer price and reflects the work of the labourer. Around 15 per cent of the retail price goes to the plantation and factory, while around 0.3 per cent goes to the auction broker. This means that around 80 per cent of the value is added further on the supply chain and accrues to the exporter, trader and/or manufacturer. A means will have to be established to ensure that some of the enhanced value from GIs returns up the value chain to producers. A particular problem for the establishment of GIs for Kenyan tea is the fact that traditionally Kenya tea has been sold to the market in bulk form. It is currently used by purchasing tea companies to blend and add taste to cheaper varieties. By selling tea in bulk, often as a generic without branding and packaging, Kenya is missing the opportunity for significantly increased export earnings.

With the growth of the supermarket in Europe and North America the character of tea buying changed quite dramatically in the 1990s. There has been a centralization of tea buying, increased buying by individual companies and the bypassing of wholesalers with direct links between the tea buyers and tea packers. Although the price of tea is

primarily determined by supply and demand, the large corporations can have a huge influence on the world markets by regulating that supply and demand. By the early 1990s, the tea market was extremely concentrated: 90 per cent of the Western trade was in the hands of only seven transnational companies and 85 per cent of world production was sold by multinationals. This concentration has since increased. The large companies have such large purchasing power that they can influence the demand (and price) for particular qualities and types of tea. The purchasing strategy of the multinational companies has been to develop blended brands over 70 per cent of the UK market. These blends can contain up to 35 different types of tea. This enables companies to select between sources of supply, differentiated according to price. For an effective GIs strategy markets will have to be developed for unblended varieties of Kenyan tea.

The marketing of Kenyan tea based on GIs branding will involve advertising and promotional effort. Currently, the advertising of tea is undertaken primarily by the leading companies. A business plan will have to be developed to interest these companies in Kenyan GIs.

GIs mapping of Kenyan tea

The principal tea growing districts in Kenya are indicated in the map below. The Technical Committee on Geographical Indications made up of the Tea Board of Kenya, Ministry of Agriculture, Ministry of Trade, Kenya Tea Development Agency Ltd, Kenya Industrial Property Institute and East Africa Tea Trade Association (EATTA) reviewed the different aspects of tea production and recommended that organoleptic properties would form a more solid foundation for demarcation of the geographical indications regions. The chemical, agronomical and meteorological properties would build the GIs profile. Information on the organoleptic properties is expected from a joint committee of the Tea Brokers Association and EATTA. Thus far, the characteristics of the seven tea growing regions of Kenya and the tea attributable to those characteristics have been identified. These are:

Nyambene: Mineral rich soils, ample climate, well-endowed rainfall producing a unique cup flavour with distinctive mellow flavour. Principal factories: Kiegoi, Michimikuru, Igembe.

Meru: Mount Kenya and Mount Kenya forest, northeast slopes, moderate cold weather patterns with ample distribution of rainfall, mineral-rich soils produce a range of teas from full-bodied to moderate. Factories: Githongo, Imenti, Kionyo, Kinoro, Weru.

Embu: Eastern slopes of Mount Kenya, upper region close to peak. Medium cup depth with smooth round characteristics, medium body liquors with a predominantly reddish tint and mild flavour. Factories: Rukuriri, Mungania, Kathangariri, Thumaita.

Kirinyaga/Nyeri: Mount Kenya high altitude forest, southern Mount Kenya slopes. Rich mountain soils, ample rain. Optimal concentration of catechans and other components giving a very desirable tea palate, characterized as medium flavoured with a bright yellowy hue. Factories: Kimunye, Kangaita, Mununga, Ndimba Ragati

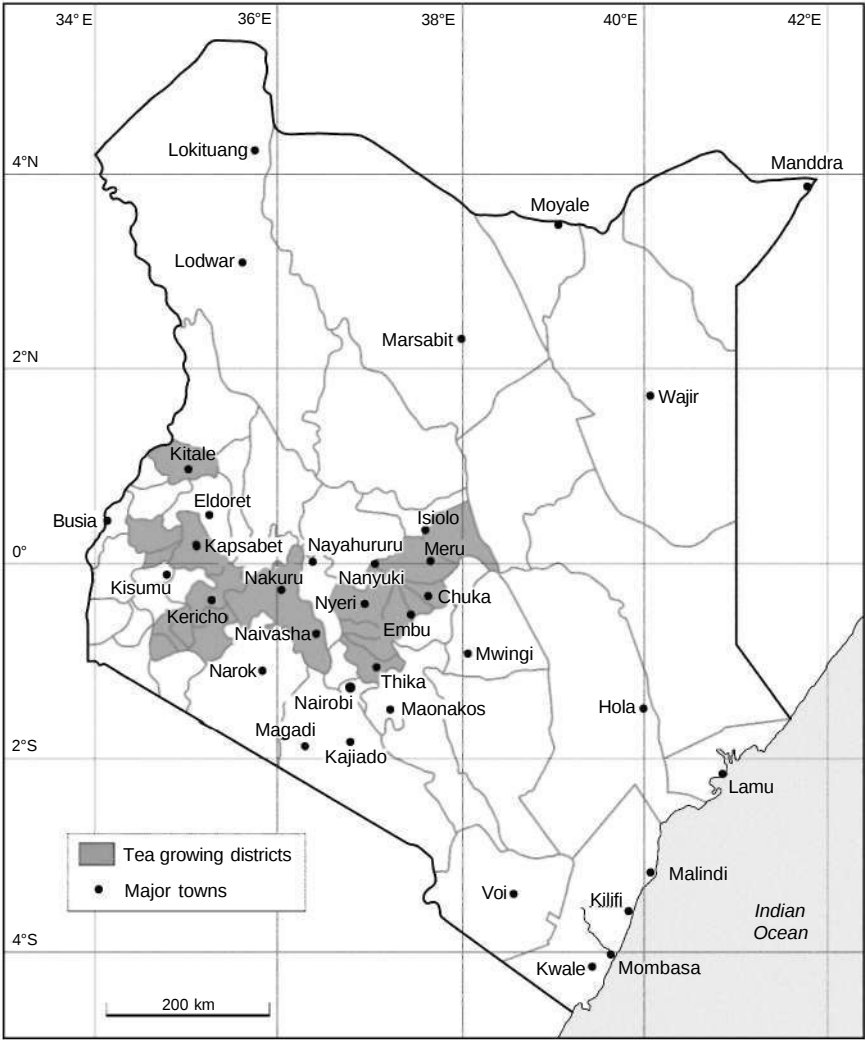
Aberdare: Aberdare ranges producing a tea with a moderate body and delicately tangy flavour, with smooth round cup attributes.

Mau Escarpment: East of Lake Victoria. All year rainfall conducive to the tea plant. Mellow characteristics, creamy cup colour and pungency.

Kisii Highlands: Lower altitudes and warmer weather producing a coppery creamy tea with intensely rich pungency.

Nandi Hills/Cheryanganyi/Lake Region: Producing a tea of unique aroma and golden cup hue. Factories: Chebut, Kapsara, Mudete.

This mapping project is expected to be completed within 2011.



It should be noted that the sale of teas under GIs is being adopted by Kenya's competitors in the tea market. For example the Word Mark 'Darjeeling' with an associated logo was developed by the Tea Board of India and registered from 1986 onwards in a number of countries, including Canada, Egypt, Japan, the UK and the US. It has also been registered as a community collective mark with OHIM. The US certification requires that it be 'used by authorized persons, certifies that the tea contains at least 100% tea originating in the Darjeeling region of India and that the blend meets other specifications established by the certifier'.¹² Darjeeling tea was registered in India as a GI in October 2004 as the first domestic GI under the Geographical Indications of Goods (Registration and Protection) Act, 1999. The definition of Darjeeling Tea contained in the application¹³ specified:

Area: Tea which has been cultivated, grown, produced, manufactured and processed in scheduled tea gardens in the hilly areas of Sardar Sub-division, only hilly areas of Kalimpong Sub-division comprising of Samabeong Tea Estate, Ambikok Tea Estate, Mission Hill Tea Estate and Kumai Tea Estate and Kurseong Sub-division excluding the areas in jurisdiction list 20, 21, 23, 24, 29, 31 and 33 comprising Subtighuri Sub-division of New Chumta Tea Estate, Simulbari and Marionbari Tea Estate of Kurseong Police Station in Kurseong Sub-division of the district of Darjeeling in the State of West Bengal, India.

Production: The GI application elaborates particular stages in the production of Darjeeling tea, which follows the 'orthodox' method for the *Camellia sinensis* cultivars. These steps include, among others, 'withering of the leaf' (slow drying over 14 to 16 hours to remove approx. 65% of moisture), rolling and twisting of the leaf, slow oxidization and fermentation and tea-leaf grading. The latter is based on leaf size and broadly follows three classifications: (a) whole leaf (Fine Tippy Golden Flowery Orange Pekoe), (b) Broken (Tippy Golden Broken Orange Pekoe), and (c) Fannings (Golden Orange Fannings). A panel of tea tasters from the Tea Board of India are involved in confirming the authenticity and quality of the tea.

In Sri Lanka, the Lion symbol was developed 20 years ago to identify pure Ceylon Tea. Exporters may use the emblem on the pure Ceylon Tea packs subject to the terms and conditions stipulated by the Sri Lanka Tea Board. The Lion symbol has been registered as a trademark in Sri Lanka and in 67 foreign countries which are important markets for Sri Lanka.

Sri Lanka has taken steps to register 'Ceylon Tea' and six growing areas as GIs.¹⁴ Initially these names will be protected domestically, with registrations in foreign markets to be undertaken in due course (FAO 2008b).

Other Kenyan industries protectable by GIs

The following Kenyan products have been identified (see Sese 2004; Odek 2005: 25–6) as those which could benefit from GIs protection: Kenya coffee, Kangeta Miraa,

Kikuyu grass, Meru potato, Mombassa and Asembo mangoes, Muranga and Kisii bananas, Molo lamb, Kitengela ostrich meat, Omena fish, Mursik milk, Keringet mineral water, Tsavonite and Magadi soda, Naivasha wine, Kakamega papaya, Kakamega omukombera and Tilapia fish from Lake Victoria and Lake Turkana as well as the Victoria Nile Perch (Mbuta). Protectable handicrafts would include Lamu doors and chests, Kisii soapstone, Akamba carvings and Maasai attire and beads.

Coffee

The major coffee growing regions in Kenya are the High Plateaus around Mount Kenya and the Aberdare ranges and the cultivation region includes Mount Kenya West, Kiambu, Kirinyaga, Muranga, Nyeri, Ruiru and Thika. The coffee is cultivated at altitudes ranging between 1,500m to 2,100m above sea level in a cool wet climate on well-drained volcanic soils. This provides excellent conditions for growing coffees of the 'mild Arabica' type, well known for its intense flavour, full body, and pleasant aroma. This is in contrast with the Robusta variety which requires a hot wet climate and a lower altitude of up to 1,500m.

According to the Coffee Board of Kenya (CBK), some 700,000 small farmers are involved in the cultivation of coffee, with 6 million people working directly or indirectly within the coffee industry. Total annual production has been fluctuating widely due to changing climate as well as socio-economic factors. The highest production was reached in 1987/1988 of around 128,926 metric tons. After a period of decline until 2005 production has been increasing. One of the measures taken to achieve higher revenues for farmers was to allow direct sales of coffee (in addition to sales through the auction) by producers, but so far a small quantity has been sold that way.

The CBK currently formulates policies to enhance coffee production, processing and marketing, in the country and globally, and registers and licenses coffee operations in the country, including coffee marketing agents, auctioneers and management agents. The CBK has taken a leading role in promoting GIs for coffee. At the beginning of 2010, the CBK launched its 'Brand of Origin' for Kenya coffee as a certification mark (see above) to give it a distinct global identity and distinguish it from beans of other origins. A strategic decision has to be taken as to whether working on a GI for Coffee Kenya (benefiting from the reputation that such a name has been achieving on international markets) or rather aim at various GIs based on specific geographical areas (such as Mount Kenya West, Kiambu, Kirinyaga, Muranga, Nyeri, Ruiru and Thika).

The characteristics of coffee from these regions are:

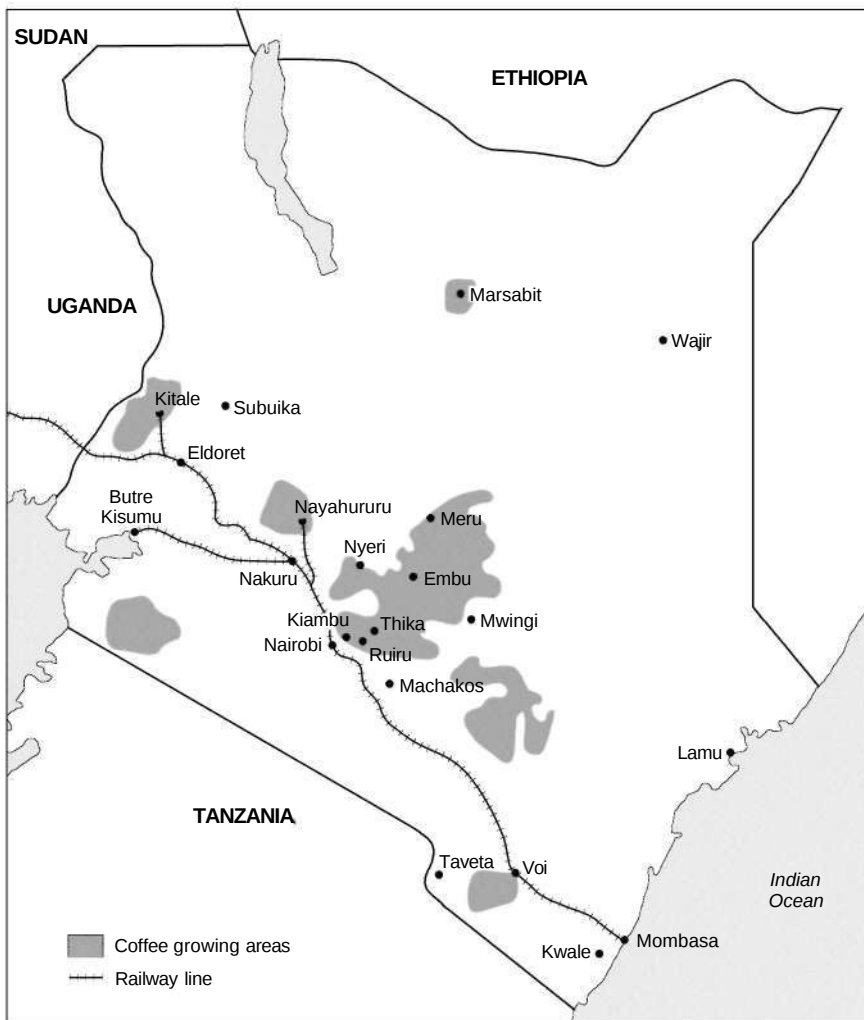
Mount Kenya West (Kiambu, Kirinyaga, Muranga, Nyeri, Ruiru and Thika): Coffee produced in this region is rich in acidity, full bodied, with a sensual aroma and hints of citrus fruits. These characteristics place this coffee amongst the best coffee in the world.

Mount Elgon and Lake Victoria region (Bungoma, Butere and Nyanza-Kisii): Coffee from this region has a fruity mild flavour.

Mount Kenya East (Embu, Meru and some parts of Machakos district): The volcanic soil of this region is of great depth and fertility on the slopes ensuring good drainage suitable for the finest Arabica coffee.

North and South Rift valley (Kitale, West Pokot, Koru, Kericho, Nakuru and Nandi): This region contains niche coffee growing areas on its cool high points with well watered soils.

Alternatively, the decision may be taken to focus upon the Kenya AA brand, which is regarded as one of the world's finest coffees. This is full-bodied, complex, and balanced with high-grown acidity, black currant flavour, and floral aroma and pronounced acidity.



Horticultural products

Horticultural products are Kenya's second most important export foreign currency earner. Government management agency on the national level is the Horticultural Crops Development Authority (HCDA), a parastatal body established under the Agricultural Act. There is a national association of horticultural exporters, the Fresh Produce Exporters Association of Kenya (FPEAK), which supports its members in quality control and compliance with good agricultural practices and in promoting their products. However, most horticultural crops in Kenya are international varieties planted with imported seeds, including seeds protected as plant varieties under the UPOV Convention and sold under the name of the variety. There are some local varieties, such as for example Ngoo mangoes and Voi oranges, which are exported under their geographical names.

Cut flowers

Floriculture in Kenya is estimated to employ some 60,000 people directly, and 500,000 people indirectly, through affiliated services to the industry, such as farm inputs, transport, packaging, etc. The total beneficiaries within the sector might be around 2 million (about 7 per cent of the population). Kenya has recently become the EU's largest source of imports (European Commission 2009). The main European Union markets are the Netherlands, the UK, Germany, France, and Switzerland. In 2008, the total declared FOB value of flower exports was Kshs 40 billion. The most important high-quality cut flowers and ornamentals exports are roses, carnations spray and standard statics, alstromeria and lilies hypericum. The main flower growing areas in Kenya are regions around Lake Naivasha, Kinangop, Nakuru, Mount Elgon, Kitale, Eldoret, Kericho, Limuru, Kiambu, Athi Plains, Thika, and Mount Kenya region with a temperate climate prevailing above 1,500m of daytime temperatures from 22–30°C and night temperatures from 6°C.¹⁵

The Kenya Flower Council (KFC) was established in 1996 to supervise the industry and comprises independent growers and exporters of cut flowers and ornamentals. The KFC seeks to provide a common platform for growers and exporters and ensure the implementation of acceptable local and international standards.¹⁶ The current KFC membership represents about 50–60 per cent of the flowers exported from Kenya. The KFC works closely with the Fresh Produce Exporters Association of Kenya (FPEAK) to ensure quality control, traceability and compliance with the national Good Agricultural Practices, to carry out promotional activities and to liaise with government and development agencies, media and trade unions.

More than 70 per cent of Kenya's cut flowers get to markets through the large-scale Dutch auctions. Dutch wholesalers buy flowers for re-export. Large-scale buyers like world's leading supermarket chain obtain their stock at Amsterdam and package and brand the flowers under their own names, with no mention of the origin-based identity.

Fermented liquors

Papaya wine made from papaya (paw-paw) grown in the Lake Baringo region was the first table wine produced by the Kenya Wine Agency Limited (KWAL), which was the sole wine producer in Kenya until 1992. The basic ingredient of the wine is paw-paw fruits grown between latitude of 0.5°N and 2.5°S in areas of below 2,100m altitude on well-drained soil with a pH of 6.0–6.5. The fruits are sourced from one region in Kenya called Baringo. Production processes are clearly defined and documented and the KWAL factory is ISO 9000 certified. Annual production is around 200,000 litres. The export potential of the wine is confirmed by several international awards. This indicates the potential of Baringo Papaya wine for GIs protection and promotion.

Another possibility for GI protection is Yatta wine manufactured by KWAL from grapes that have been cultivated on the Yatta Plateau of Machakos District since 1986. This wine is sold under the appellation ‘Yatta’. Yearly production is around 8,000 litres. Currently sales are to local consumers.

A number of traditional Kenyan beers could be sold under GIs: ‘Naisho’ made from honey and yeast from the sausage plant is sold under its Maasai name for beer. The Kikuyu and Kamba tribes make the same beer though with different names. The Kikuyu call it ‘Muratina’ or ‘Karubu’, while the Kamba call it ‘Karubu’. Kenya has not been using geographical names for its beers, although Kenya Breweries calls one of its beers ‘White Cap’ that uses the logo of Mount Kenya peak.

Honey

Kenyan honey is of a high quality. Six production zones have been identified: Yatta, Kitui, Baringo, Turkana, Mwingi and West Pokot. The producers are organized within the Kenya Honey Council (KHC) and GIs are explicitly part of its strategy.

Wild silk

Wild silk is produced by some local communities according to traditional local technique, which was improved with assistance of International Centre of Insect Physiology and Ecology (ICIPE), Nairobi. Farmers collect silk worm eggs in the bush and breed them in mosquito net cages. When cocoons are harvested, some of the pupae are allowed to mature and fly back to the acacia bushes. Wild silk is sold as raw material and not yet branded. Wild-silk production is particularly suitable for dry areas, where otherwise agricultural production is difficult. Naturally coloured wild silk from Mwea is of excellent quality and achieves higher prices in the international market than normal silk. Production processes are well documented (Raina 2004), and the production territory seems to be quite clearly delimited. UNDP seems to be active promoting wild silk production and supporting the Mwingi marketplace allowing farmers to sell their products.

Wild silk has been identified as having a high GI potential, and was recommended for inclusion in the list of pilot GIs to be supported by the Swiss-Kenya GIs project.

Notes

- 1 TMA Article 12(1)(d).
- 2 Trademark no. 59849.
- 3 www.news-kenya.com/2010/12/kenyans-look-for-alternative-sources-of-income-from-wild-plant/.
- 4 www.news-kenya.com/2010/12/kenyans-look-for-alternative-sources-of-income-from-wild-plant/.
- 5 Trademark no. 66945.
- 6 Trademark no. 65335.
- 7 Trademark no. 69058
- 8 See www.ipi.ch/en/legal-info/international-cooperation/completed-projects/kenya.html.
- 9 WTO Doc. WT/GC/W/249, 13 July 1999.
- 10 Preparations for the 1999 Ministerial Conference the TRIPS Agreement Communication from Kenya on Behalf of the African Group, WTO Doc. WT/GC/W/302, 6 August 1999.
- 11 See Statement by Switzerland on behalf of the Friends of Geographical Indications, *WTO, TN/C/4, 13 July 2004* and Doha Work Programme, The Extension of the Additional Protection for Geographical Indications to Products other than Wines and Spirits, WTO, TN/C/W/21/Rev.1, 14 December 2004, by Bulgaria, the European Communities, Guinea, India, Kenya, Liechtenstein, Madagascar, Moldova, Romania, Switzerland, Thailand and Turkey.
- 12 US Reg. No. 2,685,923.
- 13 India, *Geographical Indications Journal*, July 2004.
- 14 Nuwara Eliya, Dimbulla, Uva, Uda Pussellawa, Kandy and Ruhuna.
- 15 See Swiss-Kenyan Project on Geographical Indications (SKGI), Project Document, 12 March 2009; and Bocedi (2010).
- 16 Market Data, Kenyan Flower Council: <http://www.kenyaflowercouncil.org/marketdata.php>, referred to in Bocedi, p.16.

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12

MAURITIUS: SUGAR

Michael Blakeney

Geography

The Republic of Mauritius comprises the island of Mauritius, the island of Rodrigues and a number of uninhabited islands (such as the Agalega Islands and the Cargados Carajos Shoals) and it claims sovereignty over the Tromelin Islands and Chagos Archipelago, which includes the Diego Garcia atoll. For the purpose of this study, unpopulated islands have been disregarded, as have the Tromelin Islands with which sovereignty is contested with France and the Chagos Archipelago.

Along with the island of La Réunion which is a distance of around 200km to the south west, Mauritius and Rodrigues are part of the Mascarene Islands. This archipelago was constructed by a series of volcanic eruptions under the sea bed. The significance of this formation is that Mauritius and Rodrigues share with Réunion a common physical geography with similar volcanic soil types and a similar climate. This is of course relevant to any claims which might be made for the protection of geographical indications (GIs).

The population of the Republic of Mauritius in mid-2008 was estimated by the World Bank to be around 1.4 million people with the following ethnic composition: Indo-Mauritian 68 per cent, Creole 27 per cent, Sino-Mauritian 3 per cent, Franco-Mauritian 2 per cent.¹ The population of Rodrigues in 2006 was about 40,000. Most of the inhabitants are of mixed African and French descent. These origins together with the fact that since the 17th century, Mauritius was colonized by the Dutch, French and British have produced a diverse blend of local knowledge.

Economy

Since independence in 1968, Mauritius has developed from a low-income, agriculturally based economy to a middle-income diversified economy with growing industrial, financial, and tourist sectors. The World Bank estimated GDP in 2008 to be

US\$9.3 billion, with an annual growth rate of around 3 per cent, following a decade of growth of around 5–6 per cent. The composition of this GDP is services 64.3 per cent, industry 29.8 per cent, and agriculture 5.9 per cent.

The economy rests primarily on tourism, with sugar, textiles and apparel, and financial services in the second rung. The country is expanding into fish processing, information and communications technology, and hospitality and property development. Sugar cane is grown on about 90 per cent of the cultivated land area and accounts for 15 per cent of export earnings. The government's development strategy is designed to create vertical and horizontal clusters of development in these sectors. Mauritius has attracted more than 32,000 offshore entities, many aimed at commerce in India, South Africa and China.

The labour force is around 600,000 and employs 36 per cent in construction and industry; 24 per cent in services; 14 per cent in agriculture and fishing; 16 per cent in trade restaurants and hotels; 7 per cent in transportation and communication; and 3 per cent in finance.

The EU is the major trading partner of Mauritius. It imports the bulk of Mauritius' sugar and a large share of its textiles and clothing items, and supplies around one third of Mauritius' imports. The major destinations of Mauritian exports are the UK, France and the US. The sources of imports are diversified. China has become the biggest single source supplying around 10 per cent, followed by South Africa and France.

Until recently, Mauritius's major exports, sugar and textiles, benefitted substantially from preferential trade agreements. Most of its sugar was exported to the EU under the ACP/EU Sugar Protocol. Mauritian textiles also benefitted from preferential access to EU markets, and from the Multi-Fibre Agreement. The Sugar Protocol expired on 30 September 2009, the basic guaranteed price for raw sugar, which was negotiated annually, was discontinued. The Multi-Fibre Agreement, which was designed to facilitate market access for developing countries terminated in 2005.

The reform of the EU Sugar Regime has resulted in a 36 per cent reduction of the sugar price. This shock to the Mauritian economy has been compounded by rising oil prices and the adverse effect on textile sales caused by the dismantling of the Multi-Fibre Agreement. This comes at a time when the relevant indicators point to a deterioration of the economy and of public finance. Unemployment rate stands at 10 per cent, the budget deficit amounts to 6 per cent of GDP while the deficit of the balance of visible trade is Rs 48 billion (€1.3 billion). The overall balance of payments has moved from a surplus of some Rs 5.9 billion in 2002 to a projected deficit of Rs 9.5 billion in 2009. A rising import bill will further aggravate the balance of visible trade and the overall balance of payments. The reduction of the sugar price in the EU means a shortfall in export earnings of €782 million over the 2006–2015 period. While tourism is a very promising sector, it depends on the positive externalities of the sugar industry: soil conservation and the prevention of silt deposit in lagoons, greenery and aesthetic effects of cane plantations.

As a small island developing state, Mauritius is particularly vulnerable to adverse conditions arising from climate change, the global financial crisis and the energy crisis.

All of these factors are relevant to the development of new markets for Mauritius in which GIs can play a useful role.

In response to these stresses, the Government of Mauritius has formulated a number of policies. To deal with the shocks experienced by the sugar industry, it has formulated a multi-annual adaptation strategy in the form of a ten-year, 2006–2015, Action Plan to enable the sugar industry to be competitive, viable and sustainable in the long term. A 'Blueprint for a Sustainable Diversified Agri-Food Sector Strategy for Mauritius' was developed in 2008 by the Ministry of Agro-Industry and Fisheries. The Blueprint seeks to realize a vision of a Mauritian agri-food system which, by 2015 and beyond, would have been restructured to become: (i) diverse and multi-functional and playing an enhanced role than hitherto in securing domestic food supply and improving nutrition and health; (ii) modern and competitive, being sustainable economically, socially and environmentally; (iii) an integrated and enhanced part of the rural/whole socio-economy; and (iv) flexible and responsive to changes in consumer demand.

The President of the Republic in his Address to First Session of the Fourth National Assembly outlining the Government Programme 2005–2010 announced that SMEs will be strengthened in line with the government's vision 'to create a nation of creative and innovative entrepreneurs' by promoting 'a deep entrepreneurial culture'. The primary instrument of SME policy in Mauritius is the Small Enterprises and Handicraft Development Authority established under an Act of 2005, which has established an authority (SEHDA) which has been set up to assist SMEs.

The National Science and Technology Policy (STIP) of Mauritius was formulated in 2009 by the Mauritius Research Council with the objectives of identifying measures to increase the efficiency of local research and research-related institutions and to increase the competitiveness of the local industrial sector by promoting the use of technology and innovation. It seeks to devise policies and identify institutions to support the technological transformation, capacity-building and innovation of enterprises, to improve linkages between the research and industry sectors and enhance national, regional and international dialogue in the area of STI. A National ICT Strategic Plan 2007–2011 was formulated with the view of making ICT the fifth pillar of the economy and transform Mauritius into a Regional ICT Hub.

Mauritius is a member of, *inter alia*, the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and the Indian Ocean Commission (IOC). As an ACP country, it is engaged in the EU-ESA negotiations for an Economic Partnership Agreement (EPA). A Trade Agreement (PTA) between Mauritius and Pakistan came into operation 30 November 2007. The next step is for the PTA to develop into a Free Trade Agreement (FTA), which will have IP implications for both countries. In February 2009 Mauritius entered into a Bilateral Economic Agreement with South Africa, which is designed to encourage South African investment in Mauritius. In September 2009 negotiations commenced for a Bilateral Investment Treaty (BIT) between Mauritius and the US.

Legal infrastructure for GIs protection in Mauritius

In Mauritius there has been industrial property legislation dating back to the 19th century, derived from the British common law tradition. The initial industrial property statutes were the Patents Act 1875 and the Trade Marks Act 1868. As a consequence of its membership of the World Trade Organization, Mauritius has been obliged to comply with the TRIPS Agreement and the Patent, Industrial Designs and Trade Marks Act 2002 was enacted as an initial response. Further modification of Mauritius IP legislation has been proposed to comply with the TRIPS Agreement, to incorporate international agreements subsequent to TRIPS and for the purpose of advancing the economic and social development of the country. In April 2009 a WIPO Expert Mission visited Mauritius to advise the government to assess the current IP system, identify weaknesses, provide technical support and make concrete proposals with the view to defining specific needs-oriented activities and projects for implementation within a national Intellectual Property Development Plan (IPDP) in such a manner as to enhance Mauritius' ability to create, protect and make strategic use of IPR's and assets for economic growth and development. Its report, dated 26 May 2009, recommended the formulation of a national IP policy, the updating of its IP legislation and the centralisation of its IP administration (Leesti and Mengistie 2009). A following EU technical assistance mission in August–September 2009 provided a draft national IP policy and draft industrial property and copyright laws (see Blakeney and Mengistie 2009).

In an endeavour, particularly to encourage the non-sugar agricultural sector, a Geographical Indications Act was drafted in 2002. This Act has not yet been adopted, largely because of the ongoing review of Mauritius' industrial property legislation. The Act in section 2 defines 'geographical indication' as 'an indication which identifies a product as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin'. Section 3(2) provides an act of unfair practice defined in section 3(1) may give rise to a claim in damages. Section 3 (1)(a) provides that the use of 'any means in the designation or presentation of a product that indicates or suggests that the product in question originates in a geographical area, other than the true place of origin, in a manner which misleads the public as to the geographical origin of the product'. 'Product' is defined in section 2 as 'any natural or agricultural product or any product of handicraft or industry'.

Section 4(1) provides that the protection under the Act exists irrespective of whether it has been registered. However, part II of the Act establishes a system of registration. Under section 8(2) an application may be filed with the Head of the IP Office by 'any person carrying on an activity as a producer in the geographical area specified in the application, with respect to the product specified in the application'. Section 9 provides that the application shall specify:

- (a) the name, address and nationality of the person filing the application, and the capacity in which the applicant is applying for registration;
- (b) the geographical indication for which registration is sought;

- (c) the geographical areas to which the geographical indication applies;
- (d) the products for which the geographical indication applies; and
- (e) the quality, reputation or other characteristic of the products for which the geographical indication is used.

Upon registration, section 11 provides that no person, other than a producer carrying on an activity in the geographical area specified in the Register, shall have the right to use a registered GI in the course of trade with respect to the products specified in the Register, and which possess the quality, reputation or other characteristics specified in the Register.

Other provisions of the Act deal with GIs in relation to wines and spirits, along similar lines to Article 23 of the TRIPS Agreement.

Provisions dealing with the registration of GIs were also included in the Industrial Property Law prepared for Mauritius in 2009 (Blakeney and Mengistie 2009: vol 2). Section 239 of this Law prohibited the use of false or misleading GIs in similar terms to Article 22 of the TRIPS Agreement. Section 243 of the Law provided for the registration of GIs in similar terms to the 2002 Act. Section 249 of the Law provided for the conversion of GIs to trademarks.

The Patents, Industrial Designs and Trademarks Act 2002 of Mauritius contains its regime for registered trademarks. Section 36(1) provides that the exclusive right to any mark shall be acquired by registration in accordance with the provisions of the Act. It makes no specific reference to the non-registrability of geographic marks, but section 2(a) requires that for registration a mark shall be capable 'of distinguishing the goods or services of one enterprise from those of other enterprises', which in most circumstances would disqualify geographical marks. However, section 44 provides for the registration of collective marks. Section 35(a) defines 'collective mark' as 'any visible sign designated as such in the application for registration and capable of distinguishing the origin or any other common characteristic, including the quality of goods or services, of different enterprises which use the sign under the control of the registered owner of the collective mark'. The Act makes no provision for the registration of certification marks and in this absence and prior to the proclamation of any legislation concerned with registered GIs, the possibility of the registration of collective marks provides the only current possibility for the protection of GIs in Mauritius.

Section 44(2) of the Act provides that any application for registration of a collective mark shall designate the mark as a collective mark and be accompanied by a copy of the terms of the agreement governing the use of the collective mark. Section 44(4) provides for the invalidation of collective marks used in contravention of the terms of the agreement referred to in subsection (2) or where the use is 'in a manner liable to deceive any person as to the origin or any other common characteristics of the goods or services concerned'.

Part V of the draft Industrial Property Law 2009 provided for the registration of trademarks, collective marks and certification marks. Relevant to the protection of GIs, section 174(2) of the Law provided that a mark could not be validly registered if it was devoid of any distinctive character and if it consisted exclusively of 'signs

or indications which may serve, in trade, to designate the kind ... geographical origin ... or other characteristics of goods'. Section 200 of the Law provided that the use by a person of a sign indicating the geographical origin of goods could not be regarded as an infringing act, provided the use was 'in accordance with honest practices in industrial or commercial matters'.

Division VII of the draft Industrial Property Law 2009 provided for the registration both of collective and certification marks. Section 217(1) defined a collective mark in much the same way as section 44 of the Patents, Industrial Designs and Trademarks Act 2002. An innovation in the 2009 Law was the inclusion of certification marks, defined in section 218(1) as 'a sign used, or intended to be used, to distinguish goods or services (a) dealt with or provided in the course of trade; and (b) certified by the proprietor of the certification mark in relation to origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from other goods or services dealt with or provided in the course of trade but not so certified'. Section 218(2) provides that the application for the registration of a certification mark must designate the sign as a certification mark and shall be accompanied by the rules governing its use. This provision lends itself to the protection of GIs, in the absence of *sui generis* legislation dealing with the subject.

General introduction to the sugar industry in Mauritius

Of the annual production of 575,000 tonnes of sugar, exports to the EU and the US amounted to 540,000 tonnes and around 8,000 tonnes of special sugars was sold to 23 world market destinations with the remainder of the production available for local consumption. The bulk of local consumption is in the form of white sugar, two thirds of which is for direct use and one third for industrial use.

There are four categories of cane producers: the corporate sector and the very large planters accounting for some 70 per cent of production; the medium and large planters representing some 5 per cent of production; the small planters accounting for some 23 per cent of production; and the *métayers* accounting for some 2 per cent of production. The latter generally grow canes in difficult and low-yielding regions which are also environmentally sensitive, i.e. 'the difficult areas'. The small planters own land which is generally lower yielding than those of the corporate sector.

It should be noted that sugar cane is far more than a cash crop in Mauritius. It has a multifunctional role encompassing the namely direct economic return for all operators, small and large; gainful income for employees; net fund flows for the overall economy; food procurement capacity; reduction of the dependence of the country on imported oil; development and the indirect contributions of preserving the stability of the rural areas; protection of the environment; soil and water conservation; prevention of degradation of the landscape; maintenance of a sustainable agricultural sector. The availability of job opportunities in rural areas has shielded Mauritius from the scourge of a large number of developing countries, i.e. migration of rural people on account of poverty to form the slums of the urban areas. Moreover, the maintenance of some

50 per cent of the population in the rural areas has relieved the country from the problems of urbanisation in a situation where the population density, high by world standards, is 650 persons/km.²

The contribution of the sugar industry to the protection and preservation of the environment is multi-fold, it relates, *inter alia*, to soil conservation, biological control of pests, minimal use of pesticides, the discharge of a minimal pollution load, carbon sequestration, avoidance of imports of fossil fuels and maintenance of a green landscape. Mauritius has a very fragile ecosystem. It is surrounded by a fragile coral reef barrier that protects its lagoon, its marine life and its sandy beaches and the lands of Mauritius have a thin top soil layer. Sugar cane covers more than 40 per cent of the island's surface area. Sugarcane cultivation enables the establishment of a permanent cover throughout the year protecting against soil erosion while maintaining moisture and increasing organic matter content. Sugarcane cultivation and processing has a relatively low negative impact on the environment; it uses relatively low doses of agro-chemicals in comparison with other tropical crops such as fruit and vegetables; it is wind resistant and its strong root system binds the soil. Being a perennial crop, it maintains the soil structure untouched for several successive years and is thus very effective in controlling soil erosion. If sugarcane were to be replaced with a less stable crop in the steeply sloped marginal areas, then soil erosion and subsequent sedimentation and/or eutrophication problems may occur in downstream reservoirs or lagoons, as nutrients are washed off in top-soils. The same conditions would occur if more agro-chemically intensive crops such as fruits and vegetables were grown instead. Sugarcane is also associated with aesthetic benefits, for example in the greening of islands such as Mauritius for tourism. Thus the sugar industry provides two key assets to tourism: a green landscape and avoidance of pollution of lagoons through soil erosion.

From 1951, the production of sugar was encouraged by marketing arrangements with consuming countries (principally Britain), which had guaranteed prices and markets for the Mauritian crop. Most of its sugar was exported to the EU under the Sugar Protocol of the Lomé Convention, which granted an export quota of 300,000 metric tons, at a price which is generally quite a lot higher than that paid on the world market. In 2003, Australia, Brazil and Thailand challenged the legality of the EU Sugar Regime under WTO rules. They argued that the EU's officially unsubsidized export of sugar exist only because of the high 'intervention price' guaranteed to domestic producers under the Common Market Organization. They also argued that this quantity included the 1.6 million tonnes currently imported from ACP and India under the Sugar Protocol. The WTO Panel upheld both complaints and this ruling was confirmed by the WTO Appellate Body in April 2005.

With the termination of ACP-EU Sugar Protocol on 30 September 2009, the basic guaranteed price for raw sugar declined in Mauritius' European market from €448.80 per metric ton in 2009 to €335.20 per metric ton in 2010. At the same time the euro declined from 44.41 MUR to 38.44 MUR in May 2010, also reducing Mauritian sugar revenues. As from October 2009, a new market access agreement has been implemented by the EU in which a duty-free quota for sugar is provided for LDCs both ACP and non-ACP of up to 3.5 million metric tons. Mauritius and

Zimbabwe have been admitted to this quota, but are now competing with LDC producers within this quota.

Responding to the various external stresses to its sugar market, Mauritius developed an Action Plan for the Sugar Industry 1985–1990; Sugar Sector Strategy Plan 2001–2005 and a Multi Annual Adaptation Strategy (MAAS) 2006–2015 for sugar. The current MAAS seeks to ensure the long-term viability and sustainability of the sugar industry and to accommodate rising oil prices through the generation of electricity from bagasse (fibre left after the milling of cane stalks) and the production of ethanol as of all cultivated crops sugarcane is one of the most efficient converters of solar energy into renewable biomass.

The Action Plan and the MAAS have among their objectives the transformation of the sugar industry from an essentially raw sugar producer to a situation where it produces several types of sugar, i.e. raw, special, industrial and white.³ Some emphasis is placed upon the use of cane in newly commissioned bagasse/coal power plants. Cost reduction is to be achieved through the closure of seven out of the existing 11 factories to realize economies of scale; reduction of the area under sugar cultivation from 72,000 to 63,000ha⁴ with a voluntary retirement scheme for those currently involved in the sugar industry. In other words, the central focus of the Action Plan and the MAAS is cost reduction.

Absent from the Action Plan and the MAAS is any proposal to maintain the demand for sugar or for capturing a premium price for Mauritian sugar through marketing or product differentiation. The development of a GI for Mauritius Demerara sugar offers the opportunity for market diversification. In the event that the Mauritius Demerara GI manages to maintain or enhance the international, regional or domestic demand for sugar, the proposed decline in the industry may be moderated over the 2006–2015 period. The role of GIs in preserving traditional landscapes and in maintaining rural employment and in maintaining sustainable environmental practices would support this aspect of the MAAS.

The MAAS envisages that the EPA between the Eastern and Southern African region and the EU, coming into effect as from 1 January 2008, creates a new policy space which ‘could act as a boost to the emerging sectors’.⁵ The introduction of a GI for Mauritian Demerara sugar may well be a candidate for a new sector, particularly bearing in mind the sympathy of the EU for GIs development.

Administrative infrastructure for the sugar industry

Since 1984, the Mauritius Sugar Authority, operating under the Ministry of Agriculture, has advised the government regarding sugar policy. In addition, the authority acts as a nexus between the government and the numerous organizations involved in sugar production. These organizations include parastatal, producers’ and workers’ organizations, as well as extension and research bodies. The private Mauritius Sugar Syndicate, which has offices in London and Brussels, handles all aspects of domestic and foreign sugar marketing, including transportation, finance, insurance and customs duties. The Mauritius Sugar Industry Research Institute (MSIRI) conducts research in such areas as plant breeding, entomology and food-crop agronomy.

Mauritius Demerara sugar

Mauritius Demerara sugar is sugar manufactured from sugar cane grown in Mauritius of the Demerara type, namely, brown sugar made directly from the juice of the sugar cane and noted for its coarse and sticky amber crystals. Demerara sugar is made by partially refining sugar cane extract, whereas most brown sugar is made by adding molasses to fully refined sugar. Most of the sugar which is produced in Mauritius is sold as white refined sugar. In 2009, only 68,440 metric tons of special sugars were produced out of a total production of 467,234 metric tons. Of the special sugars, which are brown unrefined sugars, Demerara predominated, but there are no statistics on the production of Demerara sugar as a specific category.

The sugar cane plant was introduced in Mauritius in 1639 by Dutch colonizers to produce artisanal rum. The first sugar mill was set up at Villebague in 1745. Subsequent colonial powers (France and then Great Britain) used the slave trade and the indentured labour system to expand and consolidate the industry. At its peak in 1838, there were 259 sugar mills in Mauritius. In 2006, sugar cane was cultivated over 72,000ha (40 per cent of the island's area and 80 per cent of its arable lands).

The respondents surveyed did not consider that sugar was influenced by climate or other natural characteristics, but that the long period of sugar production was identified as contributing to local knowledge about planting and processing of sugar. This local knowledge was identified as particularly important for specialty sugars such as Demerara.

Protection for 'Demerara Mauritius'?

Trademark searches were undertaken in 2008 for the Mauritius Sugar Syndicate for 'Demerara Mauritius' with a view to registration internationally. Searches were undertaken for the denominations 'Demerara' and 'Mauritius' in the International Nice Classification classes 30 and 33 in Austria, Benelux, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Spain, Latvia, Lithuania, Liechtenstein, Malta, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Sweden, Switzerland, the UK and amongst international and EU trademarks. The view was taken by trademark counsel that neither Demerara nor Mauritius were distinctive enough to be registered. This was based in part on a notification sent by OHIM to an applicant to register Demerara that it is a sign or indication that has become 'customary in the current language or in the bona fide and established practices of the sugar trade' to indicate 'brown crystallized sugar from the West Indies and nearby countries'. It pointed out that the mark 'also consists exclusively of a sign or indication which may serve in trade to designate goods which may contain Demerara sugar, in particular cereal products'. For these reasons OHIM rejected the mark as being 'devoid of any distinctive character'.

It should be noted however that Demerara has been registered as part of a composite mark in Switzerland, the UK and under the Madrid system and as a Community Trademark (CTM). The CTM 'Demerara Gold' was registered in 2007 by the Guyana Sugar Corporation, Inc in several classes, including for sugar. Finally, 'Demerara Brown Cane Sugar' was registered in Bulgaria in 2005 in class 30 for sugar.

The word 'Mauritius' despite its geographical connotations has been registered as a mark for coffee, flour, breads, pastries, condiments, chocolate and ice creams in a number of European countries.

However, because of the perceptions of the general descriptiveness of the mark 'Demerara Mauritius', the Mauritius Sugar Syndicate was advised not to proceed with a trademark registration, but to apply for a collective CTM and for a collective trademark in Mauritius.

The right to use the name 'Demerara' in relation to sugar products had been the subject of litigation in England in the 1913 case *Anderson v. Britcher*.⁶ The respondent had been charged with unlawfully selling as 'Demerara sugar' a sugar that was 'cane sugar crystals coloured with an organic dye foreign to genuine Demerara sugar, so that the sugar was not of the quality, substance, or nature of the article demanded by the purchaser'. It was found by a police magistrate that the sugar was a crystallized cane sugar grown in Mauritius and coloured with dye. The magistrate dismissed the charge, finding that the term 'Demerara sugar' was a 'generic term applicable to any sugar of the substance, kind, and colour of the sugar in question wherever produced, and that therefore the said sugar was of the nature, substance, and quality of the article demanded by the appellant, the purchaser, and that accordingly the sale was not to his prejudice, and that no offence had been committed by the respondent'. The case was appealed to the King's Bench Court. In dismissing the appeal, the Court agreed with the magistrate's view on the genericity of 'Demerara' and observed that:

It would appear that 'Demerara sugar' does not mean sugar having certain qualities peculiar to Demerara sugar, but it means a sugar which is cane sugar and which has a particular colour owing to certain treatment, and it is stated that Demerara sugar as originally produced was white, and probably if a person asked for Demerara sugar and was offered real Demerara sugar in its natural state he would refuse it. This sugar which the appellant got when he asked for Demerara sugar was Demerara sugar in every single particular as understood by everybody who deals with such things, except that it was grown, not in Demerara, but in Mauritius.

It was stated and admitted that with regard to Demerara sugar the word 'Demerara', as applied to sugar, does not mean sugar grown only in Demerara; it means sugar grown in Demerara, or in Grenada, Martinique, or St. Kitts, or Tobago, or Barbados, or Dominics [sic] or in many other islands of the West India group, and therefore the case really is hardly distinguishable from that of a Brussels carpet, which nobody supposes to be necessarily a carpet made in Brussels, or the case of a Cambridge sausage, which I suppose nobody believes to come necessarily from Cambridge.⁷

The question of the genericity of litigation has been considered in recent litigation in Ontario and New York concerning the activities of a Canadian importer Bedessee Imports Ltd, and a US importer Bedessee Imports Inc, which from 1984 imported

and sold raw cane sugar from Mauritius, under the trademark 'Demerara Gold'. These activities were a source of concern for Guyana's Minister of Agriculture, Robert Persaud, and the Guyana Sugar Corporation, Inc (Guysuco). In April 2003, Guysuco launched its first branded sugar for the retail trade, which it also called 'Demerara Gold'. Guysuco began a process of registration of the name or mark 'Demerara Gold' in Europe, Trinidad and Tobago, Antigua and Guyana, and it has other applications in progress in the West Indies. In October 2003, Guysuco wrote to the principal of the Bedessee corporations, inviting him to submit an application for a distributorship of Guysuco's 'Demerara Gold' product in Canada. Bedessee replied that although he would be happy to buy bulk sugar from Guysuco, and stated the mark 'Demerara Gold' was owned and used in Canada by Bedessee Imports Ltd and was not available to Guysuco in Canada and the US. Also in 2003, Guysuco applied to the Canadian Intellectual Property Office to register the mark, which prompted an opposition by Bedessee, which later applied to register the same mark. Guysuco in turn filed an opposition to Bedessee's application. Guysuco subsequently abandoned its Canadian application for registration of 'Demerara Gold' as its trademark.

In an action brought in May 2010 in the Ontario Superior Court of Justice,⁸ it was alleged that from 5 June 2009 a bulletin published by Guyana's Government Information Agency stated that Guysuco would be taking an 'aggressive stand with respect to the deceitful use' of its 'Demerara Gold' brand by others.⁹ It referred to Bedessee's as having 'deceitfully packaged and branded its products', thereby 'duping' Guyanese in North America. These allegations of deception were repeated in a Media Release of 9 June 2009 from the Guyana Ministry of Agriculture which also reflected adversely on the marketing reputation of Bedessee.¹⁰ These statements were also repeated in briefing notes issued on 19 June 2009 for a press conference held by the Ministry of Agriculture in New York.¹¹ These statements resulted in an action for defamation brought by Bedessee in the Ontario Superior Court of Justice under the Ontario Libel and Slander Act 1990 against the Minister, Guysuco and various media companies that reported them. The defendants sought to have the case dismissed or stayed. The Minister claimed that as a functionary of a foreign state acting in his official capacity, with a view to protecting the vital economic interests of the Guyanese state he was immune from the jurisdiction of a Canadian court under the State Immunity Act or in the alternative, if the action was not dismissed, it should be stayed because there is a virtually identical parallel proceeding pending in the state of New York. The motion judge refused to dismiss or stay the case ruling that in relation to the Minister the statements at issue had a stronger nexus to the commercial activities of the Guyanese state, carried on through its wholly-owned state sugar company Guysuco, than they did to the sovereign interest of Guyana in informing and protecting the Diaspora or promoting agricultural activity in general.¹² As the New York action had not commenced, the motion judge declined to stay the action.¹³

The motion judge's decision was unsuccessfully appealed to the Ontario Court of Appeal on the ground that he should have given primary attention to the nature of those statements, namely, that they were statements by a minister speaking on behalf of the Government of Guyana in the public interest of Guyana.¹⁴ The Court of

Appeal agreed with the motion judge's reasoning, particularly the fact that a lawsuit concerning statements which disparaged the brand of a competitor 'was neither an affront to the dignity of the Guyanese state nor an interference with its sovereign functions'.¹⁵

In being concerned with procedural matters, this litigation did not call into question the correctness of the 1913 ruling in relation to the genericity of the description 'Demerara' in relation to sugar.

The production and marketing chain for Mauritius Demerara

Three different producers of Demerara sugar with marketing are centralized at the MSS. In excess of 20,000 persons are directly employed as sugar growers. Thus, 60,000 persons, one out of every three families in the rural areas, are directly or indirectly involved in the sugar industry. No thought has been given to the allocation of particular cane for Demerara production. On the other hand five cooperatives, producing 8,000 metric tons, obtained Fair Trade Certification for special sugars. A further 25 cooperatives have applied for Fair Trade Certification, to produce 15,000 metric tons of special sugars. Some thought could have been given to introducing Demerara Mauritius as a sub-brand.

Other GI possibilities for agricultural products in Mauritius

With the assistance of stakeholders, a number of agricultural products, in addition to Mauritius Demerara sugar, have been identified as suitable for GIs protection. A number of these products originate from Rodrigues Island. The main economic activities of Rodrigues are agriculture and fishing. Since its autonomy in 2002, Rodrigues plans to promote itself as an Organic Production island. The island has a rich heritage of traditional food items, which can be produced and marketed with an organic label. Giving a boost to Rodriguan agriculture is one of the main activities defined in the five-year plan for the non-sugar agricultural sector in Mauritius.

A 2005 project supported by New Partnership for Africa's Development (NEPAD), Comprehensive Africa Agriculture Development Programme (CAADP), Food and Agriculture Organization of the United Nations, 'Strengthening the Agro-Processing Capacity of Rodrigues',¹⁶ identified pig farming and the production of limes and chillies (piments) as suitable agro-industries for development. Respondents have suggested that the marketing of Rodrigues limes and chillies could be supported by GIs, as well as Baie Topaz red beans from Rodrigues and Rodrigues honey. Other suggestions for GIs from Mauritius are Bois Cheri Tea and Chamarel Coffee, as well as various exotic fruits from both Mauritius and Rodrigues.

The NEPAD project proposed the establishment of the Rodrigues Trade and Marketing Agency (RTMA) to oversee the production and marketing of the products to be produced under the project. The NEPAD project identified as a 'solid justification' the fact that 'important market sources already exist' for the products and that 'other markets can be found and maintained for the produce by emphasizing on the

Rodrigues Label as a mark of quality for products manufactured in Rodrigues under agreed and established standards of quality'.¹⁷ The RTMA would also be in a very good position to administer any GIs which are developed for the marketing of Rodrigues' products.

Additionally, the NEPAD project proposes the strengthening of the Rodrigues farmers' association, *Fédération des Eleveurs et Planteurs de Rodrigues* (FEPER). It suggests the creation of separate associations for each product (*filière*) under the supervision of the FEPER. Each member association will have responsibility for ensuring that production/farming takes place in line with procedures and farming techniques recommended by the DoA. The latter's Agricultural Services will be called upon to play a key role to support the federations of farmers. The associations will become the fundamental pillars for smallholders and, with the support of the Agricultural Services, will provide a diverse range of services such as input supplies, training and technical assistance, technology transfer and so forth. They will also offer market information, support in production and marketing planning, laboratory services, access to transport facilities for those situated in remote regions, and legal and accounting support.

Piment Rodrigues

Several varieties of chillies are grown in Rodrigues but the most famous one is the small chilli traditionally known as 'Piment Martin'. It has a very high market value on both local and export markets. It is processed in different type of products such as in brine, pickles, paste and sauce. However, during the last 15 years, production has decreased considerably from 1,860kg in 1990 to only 700kg in 2005. This decrease is due mainly to cross-breeding with imported varieties, unavailability of good quality seed, prolonged drought periods and pests and diseases, mainly mites. Chilli cultivation is done in backyards. Agro-processors (mostly households and small cooperative societies) usually source their chilli requirements directly from growers. Middlemen are also active in collecting fresh chillies for export to Mauritius.

A UNDP Global Environmental Facility Small Grants Programme project is the establishment of a chilli village in Baladirou.¹⁸ Fishing is the main economic activity of the families of Baladirou. Fish catches in the lagoon of Baladirou have been declining, thereby reducing the revenue for the families. The village committee of Baladirou with the assistance of the Mauritius Commission for Agriculture is developing a commercial chilli production project (chilli village) for 47 fishers in the village. The beneficiaries will do the production of chilli and the RTMC will do marketing.

The project aims at re-deploying 47 fishers into sustainable chilli production, identification and geographical characterization of the variety. This will help to maintain the purity of the local chilli and identify ways for further research on the variety. Part of the project will involve the development of a GI label to assist in the marketing of the product, which will be marketed by RTMC. In addition to the production of chilli, the beneficiaries will have the chance to be trained in composting. The project is a good example of sustainable agriculture for it is giving the villagers of Baladirou the

chance to preserve and improve the productivity of agricultural lands in their village. Baladirou is situated in a dry part of the island where water is very scarce. This project will permit the development of dry farming there and also allow the beneficiaries to adopt rainwater-harvesting techniques (rooftop and runoff) for irrigation as water is a major problem in this village.

This project offers the 47 fishers of Baladirou a chance to have an alternative economic activity other than fishing. This will reduce pressure in the lagoon while continuing to enjoy a decent life through alternative revenue.

The setting up of the chilli village at Baladirou will serve as an example to develop a second chilli village which has already been identified at Mt du Sable where another 40 families will be concerned. This second village will put an additional area of 3ha of abandoned agricultural land under chilli production.

Rodrigues limes

Fresh limes have an important market in Mauritius where they are appreciated because of their unique features such as size, taste, juice content and their use in religious festivals. Over the years, Rodriguans have developed exclusive recipes of 'piment-limon' which are green pickled lemons ground with chillies and 'aigre-doux limon'. These recipes are identified in the NEPAD project as holding promising potential for export, provided they are produced in accordance with international norms and standards.¹⁹ Pickled limes are identified as having good marketable potential in Europe.

Baie Topaz red beans

The Association des Planteurs Haricot de L'île Rodrigues, a non-government Organization, in July 2008 received a grant from UNDP to improve local red bean production in Baie Topaz, Rodrigues Island.²⁰ Local red bean pulse is one of the main traditional cash crops being grown by the planters of Rodrigues. It is a French kidney bean type that through years of production and selection has developed specific Rodriguan characteristics, in taste and adaptation to a range of agro-climatic conditions, that makes it very popular amongst the local people and visitors. The produce fetches a high price on the market, compared to the price of the imported bean pulse (two to three times higher).

This project consists of providing the planters in the village of Baie Topaz and its vicinity with facilities for them to increase and improve their production, with less reliance on the services offered by the Commission for Agriculture, excluding Extension Services. The project will target some 60 bean planters in the region. Bean is the main cash crop of these planters and it is planted every year at almost the same period. Only one crop is planted per year. There are agricultural lands still available in this region for agricultural activities. The project will be used as a boost to encourage more planters to get involved in bean production and for those already involved to increase their area under production and their yield. The overall objective is to increase production for the local market and for export.

The UNDP project aims at improving the production capacity of the bean producers in the region of Baie Topaz by making them more autonomous in their activities. Presently, they are depending on a great extent on the Agricultural Services for the preparation of their land as well as for pests and diseases control.

The project is in line with the policy of the Commission for Agriculture to increase area of land under production, to increase yield and the *filière* approach. Moreover, since the action is region specific, the impact of the project will be more visible and this can serve as example for development of the other *filières* and key crops identified by the Commission (such as local lemon, chilli, onion, fowl). The project is also in line with UNDP's Global Environmental Facility Small Grants Programme's promotion of sustainable agriculture and encouragement of the use of local varieties and breeds.

The origin of the bean that is being planted is not currently known, so the project aims at identification and characterization of the variety which will help to maintain the purity of the local bean and identify ways for further research on the variety. This will be important if the product is going to be marketed with a Rodriguan GI and as an organic product.

The Association des Planteurs d'Haricot de Rodrigues, as the only Rodriguan association of Red Bean growers, would be the ideal body to administer a GI. Among its objectives are promoting the use of the product and promoting and safeguarding interests of its members pertaining to the marketing of their products.

Bois Cheri tea

A French priest, Father Galloys, introduced the tea plant, *Camellia Sinensis*, to Mauritius in 1760. Pierre Poivre planted it on a large scale in 1770. But, until the arrival of the British, it remained little more than a museum plant. In the 19th century, Sir John Pope Hennessy revived local interest in tea cultivation and consequently a tea plantation was started at Nouvelle France and at Chamarel. By the end of the century, 190ha had been planted. Gradually, more people became interested in tea cultivation and there was a net increase in private plantations and new factories were built. By World War II, 850ha were under tea, five factories had been established and production for local consumption was in full swing.

In 1955, the government launched the Tea Smallholding Scheme and the Project Planters' Scheme. The aim of the smallholding project was to establish tea plantations on Crown Lands for eventual long-term leasing at nominal rental rates to smallholders grouped in tea cooperative societies. The Project Planters' Scheme aimed at leasing state lands to prospective planters who were agreeable to establish tea plantations at their own costs. Tea villages were established by the government to encourage the smallholders to live in vicinity of the tea plantations.

The Tea Control Board was established to regulate and control the activities of the expanding Tea Industry, the Tea Industry Control Ordinance 1959, which came in force in February 1960. The Tea Development Authority (TDA) was created to consolidate smallholders' schemes on state lands and to develop the scheme

geographically in other areas. By 1975, the TDA established an additional 1,234ha of tea plantation. People joined the TDA as trainees to eventually cultivate tea as smallholders. In July 1986, the Mauritius Tea Factories Co Ltd was instituted to take over the tea manufacturing and marketing activities from the TDA. The TDA's role was restricted to management of smallholders and monitoring of leaf produced by this category of tea planters.

Currently some 1,414 planters cultivate an area of 709ha under tea. The local production of tea annually ranges from 1,300 to 1,600 tonnes. Three tea factories, Bois Cheri, Corson and La Chartreuse, are in operation. The average local consumption is 1,500 tonnes annually. This production is domestic oriented. The average quantity of tea exported is around 40 tonnes annually. Income derived from these exports has been around Rs 6 million. Mauritian producers consider that they cannot easily compete with the major tea-producing countries in the world such as India, China, Sri Lanka, Kenya and Indonesia as its production costs are high and the quality of tea produced locally falls in the category of low medium which is generally used as a filler in the tea blending process.

The government through the Tea Board protects the local tea industry. In fact the Board, as a general principle, does not allow the import of black tea except a minor amount for blending purposes. An importer of tea has to pay for an import licence fee of Rs 5,000 per consignment for any type of tea imported, an import levy of 17 per cent of CIF value landed Mauritius and a customs duty of 40 per cent. With the general trend of liberalization of world trade, the future of the local tea industry will depend on how long this protection can be maintained, or whether local teas can be exported.

To date no consideration has been given to whether Mauritian tea can be promoted through the use of GIs, although respondents identified Bois Cherie tea as a distinctive variety which could command a niche market.

Exotic fruits

Commercial production of fruits in Mauritius is mainly restricted to pineapple, banana and litchi and undertaken mostly on land that was not suitable for sugarcane, and with limited utilization of resources such as irrigation and know-how. The Ministry of Agro Industry and Fisheries' 'Blueprint for a Sustainable Diversified Agri-Food Sector Strategy for Mauritius 2008–2015' reports that numerous opportunities exist for expansion because:

Fruit consumption is still low in Mauritius (estimated at 30kg/capita per annum) compared to European intakes (45–90 kg).

The climatic and soil conditions of Mauritius allow the growth of up to 50 fruit species, with minimal inputs.

Two fruit species, pineapple and litchi, already enjoy a good name on the European market.

The tourist industry, which is already accommodating 850,000 tourists annually and targeting 2 million in the coming three years, constitutes a significant domestic market for fresh fruits, fruit juices and processed fruits.

Many fruit species are already growing with minimal chemical inputs throughout the island and can be exploited as bio-fruits for niche/ethnic markets or for innovative processed products.

New promising germplasm, production techniques, postharvest and processing technologies are now available for commercial exploitation of locally adapted fruit species.

The small size of Mauritius can be a strength in the export of fresh fruits because any commodity harvested in the morning can be air freighted on the same day and can reach most overseas destinations within hours, thus conserving the freshness of the produce. The opening of Mauritian air space to new and more airlines expands access opportunities for new niche markets of high purchasing power (such as Dubai).

A number of Mauritian fruits have been identified as being particularly healthy not only as a good source of vitamins but also of anti-oxidants; some local fruits are even attributed medicinal properties, for example, jamoon (jambelon); guava; passion fruit, star fruit, among others.

The production of fruits also offers a great potential for import substitution as the growing number of tourists appear to prefer exotic, indigenous Mauritian fruits compared with the imported alternatives.

The Agri-Food Sector Strategy envisages the development of the fruit sector through the optimum utilization of suitable land and other inputs, setting up private nurseries to improve breeding of varieties and breeding and grafting techniques. What has not yet been incorporated in this strategy are methods for the effective promotion of Mauritian fruits through a GIs system.

Among the fruits which have been identified as having significant export potential are litchi, bananas and pineapple. Additionally, the following underutilized fruit types have also been identified as suitable for development for export: the *annona* group (ate, coeur de boeuf, atemoya, corosol); papaya; mango; starfruit; guava; avocado; passion fruit; strawberry; acerola, etc.; and neglected ones such as tamarind, jambelon, jambos, jamalac, jamrosat, jujube, bergamotte, bilimbi, coeur demoiselle, fig, pomegranate, breadfruit, jackfruit, mulberry, jaboticaba, local cherries, vavangue, local olive, loquat, pamplemousse.

It is envisaged that under the Agri-Food Sector Strategy, a targeted area of 100ha will be provided for these minor fruit species, in addition to establishing a germplasm collection with a view to developing production of around 3,000 tons of exotic fruits by 2015. The potential of producing organic fruits and vegetables for niche markets, tourist industry, the agro-processing sector and the export market exists in Mauritius. Organic production can help differentiate its export of fruits and to access viable and value-added markets to benefit from higher prices. The major constraints in developing organic production locally are the absence of an organic production zone and the

absence of a national organic food inspection and certification system. A Mauritian GI system could underpin this production, with the body responsible for the management of the relevant GIs providing the inspection and certification system.

Tai So litchis

Litchis were introduced into Mauritius in the early 19th century and until recently have been grown in private gardens for local consumption. However, an export trade has been developing in recent years. Some ten growers in 2010 produced around 50 metric tons, of which 60 per cent were exported, mainly to Europe, but with sales also into the Middle East. The leading cooperative of producers is the Litchi du Parais Maurice Cooperative Society Ltd, which is aiming at an annual production of 3,000 metric tons.

Main competitors are producers in Réunion, Madagascar and South Africa. GIs protection has not yet been sought, largely because of the smallness of the current trade and the perceived expense of protection. A particular problem that needs to be overcome is the fact that the Mauritian Tai So litchi is indistinguishable from that grown in Réunion, so any GI would have to be shared with France. Apparently the litchi grown on volcanic soils is distinguishable from those grown elsewhere.

Ornamentals and cut flowers

Ornamental crop production is a developing sector in Mauritius, dominated mainly by Anthurium of which 294 tonnes of blooms were exported in 2006, for an export value of Rs 96 million. However, a lot of interest has been shown in recent years in the production of other ornamentals such as gerbera, roses, orchids, foliage species, heliconia, strelitzia, hanging lobster claw, alpinia, gladiolus, lilium and various seasonal flowers. In 2005, the export of cut flowers and foliage was Rs 100 million, while the import of ornamental crop species was valued at Rs 8.6 million (2004). The Agri-Food Sector Strategy proposes the expansion of this industry 'through the empowerment of farmers, the provision of infrastructure facilities for intensive cultivation and additional technical know-how'. Not mentioned in the Strategy is the promotion of this sector through marketing or promotion. The deployment of appropriate GIs would be of assistance in this regard.

Rodrigues honey

Another product with potential for GIs promotion is Rodrigues honey. The Minister of Agro Industry and Fisheries has reported that currently in Rodrigues the honey sector comprises 190 beekeepers keeping a total of 2,300 colonies which produce some 25 tonnes of honey per year.²¹ Rodriguan honey has been recognized as being of very superior quality. Rodrigues has the potential to increase capacity because of the excellent climatic conditions combined with a pest- and disease-free environment. It is targeting a production of 75 tonnes and a maximum of 3,000 hives by 2015. The

government is providing capacity building assistance to beekeepers, in the areas of production and innovation, for example, exploring the development of citrus and eucalyptus honeys. The Rodrigues Trade and Marketing Company is exploring the global marketing possibilities of this honey. The development of a GI to assist this marketing is a logical next step.

Processed onion bulbs (pickled onion and onion in brine)

Onion Toupie is produced on the southeast coast of Mauritius (namely, Bamboux Virieux, Grand Sable and Petit Sable). It is highly appreciated because of its pungency and storability. It already sells at a higher price on the local market. The export market is an emerging one especially for the processed products from the onion setts, popularly known as Onion Mars.

There are currently around 100 producers who produce as family groups. They are members of the Association des Producteurs du Sud Est (APSE), which is supported financially and technically by the Mouvement pour L'Autosuffisance Alimentaire (MMA).

The producers and the APSE have currently been discussing the opportunity to protect the product under a GI regime, but in the absence of national legislation have not taken any initiative to look for any kind of GI protection for the product.

Notes

- 1 http://devdata.worldbank.org/AAG/mus_aag.pdf.
- 2 Sugar Action Plan 2006–2015: Safeguarding the future through consensus, 18 April, 2006. www.gov.mu/portal/sites/moasite/download/Multi%20Annual%20Adaption%20Strategy.pdf.
- 3 *Ibid.*, para 19.
- 4 With cane production moving from 5.2 million tonnes to 4.75 million tonnes, *ibid.*, paras 91–2.
- 5 *Ibid.*, para 10.
- 6 24 Cox's Criminal Law Cases, 60.
- 7 *Ibid.*, 65.
- 8 *Bedessee Imports Ltd. v. Guyana Sugar Corporation, Inc.*, 2010 ONSC 3388.
- 9 *Ibid.*, para 23.
- 10 *Ibid.*, para 28.
- 11 *Ibid.*, paras 31–6.
- 12 *Ibid.*, para 59.
- 13 *Ibid.*, para 67.
- 14 *Bedessee Imports Ltd. v. Guyana Sugar Corporation, Inc.*, 2010 ONCA 719.
- 15 *Ibid.*, para 6.
- 16 TCP/MAR/2904 (I), (NEPAD Ref. 05/16 E).
- 17 *Ibid.*, para III.5.
- 18 UNDP Project 'Conserving Agro-biodiversity: Setting up of a Chilli Village at Baladirou', MAR/SGP/OP4/RAF/Yr3/09/03.
- 19 MAR/SGP/OP4/Yr2/CORE/08/06.
- 20 http://sgp.undp.org/web/projects/14511/%E2%80%9Cimproving_local_red_bean_production_in_baie_topaz_rodrigues%E2%80%9D.html.
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13

MOROCCO: ARGAN OIL

Sophie Réviron with the collaboration of Nadja El Benni

Morocco is to date the only producer of Argan oil in the world. The Souss Massa Draa region represents 86 per cent of the total Argan production of Morocco (Ouraiss and Benslimane 2007). In Souss Massa Draa, the yearly production quantity is 50,000 litres of oil out of 800,000ha of Argan forest (Ouraiss 2007). Bouzemouri (2007) estimates the actual production quantity to be about 100,000 litres Argan oil per year that could be considerably increased.

About 4,000 tons representing one third of total production are domestically consumed, the rest of about 6,000 tons is exported. The main importing countries are the European Union (France, Netherlands and Germany), North America and Israel. Prices for Argan oil vary a lot as the oil can be used for a variety of food (Argan oil from roasted kernels) and non-food products (oil from un-roasted kernels usually used for cosmetics or massage). The distribution is done by private firms or cooperatives mainly as finished product but also in bulk as ingredient for cosmetic products.

Uniqueness of Morocco's Argan oil

The Argan tree (*Arganiaspinosa*) belongs to the family of Sapotacea and can be traced back over more than 2 million years. Its unique, very deep and wide-reaching root system allow it to make excellent use of the water in the soil and can channel extremely heavy rains below ground, thus raising the groundwater level. The fruit ripens year-round and in a good year a tree may bear up to three generations of blossoms and fruit at completely different stages of maturity at the same time. The Argan tree can tolerate drought and temperature of over 50°C by going dormant (Nill and Böhmert 2006).

The Argan tree grows in the broad basin of the Souss and Massa Rivers in southwest Morocco, a semi-arid region known as the Arganeraie (Nill and Böhmert 2006).

The area is in total 72 500km², which relates to 10 per cent of the total national territory (Ouraiss 2007). The tree population covers a total area of approximately 800,000ha (see Figure 13.1). The density varies from 250 to under 40 trees per hectare, and the natural tree stocks in Morocco are estimated to be between 150 and 250 years old (Nill and Böhmert 2006). UNESCO and the Moroccan state classified the Moroccan Argan tree as Biosphere Reserve in 1998 (origin-gi.com, accessed April 2008). The Arganeraie region comprises six provinces: d'Essaouira 130,000ha, Agadir 37,000ha, Chtouka-Ait Baha 90,000ha, Tiznit 140,000ha, Taroudant 360,000ha and Inzeguane-Ait Melloul 13,000ha (Bouzemouri 2007). Of the total regional BIP,



FIGURE 13.1

TABLE 13.1 Percentage of acid fat in different vegetable oils

	<i>peanut</i>	<i>hazelnut</i>	<i>olive</i>	<i>sesame</i>	<i>sunflower</i>	<i>Argan</i>
Oleic acid	48–66	66–83	55–83	37–42	15–25	43–50
Palmitic acid	8–13	5–9	8–14	8–11	8–13	10–15
Linoleic acid	14–28	8–25	3–14	39–47	50–62	28–36

Source: Guillaume et al. 2007

13 per cent is earned through agriculture and provides employment for 17 per cent (150,000) of the Souss Massa Draa population (Ouraiss 2007).

The oil is taken out of the kernels. Typicity is verified with organoleptic tests, for food purposes. More recently, lab analysis has identified a very specific profile. It contains more than 80 per cent unsaturated fatty acids, Vitamin A, considerable quantities of tocopherol and a remarkable quantity of sterols. The oil can be used for food or for cosmetics or health purposes (Nill and Böhmert 2006). Its composition compared to other vegetable oils is unique (see Table 13.1).

Marketing strategy

Argan oil is a traditional product that used to be produced by hand by women and sold along the roads for the local market. It was used for food and cosmetics purposes by Moroccan women. The qualities of the Argan oil were studied by Zoubida Charrouf, a Professor of Chemistry at the University of Rabat, as demand was growing on the international market.

Through the mid-1990s, the previously steady growth of the domestic Argan oil market slowed down and the non-traditional, high-value oil markets expanded dramatically in the late 1990s. Exporters quickly recognized that artisan Argan oil extraction and marketing were ill-suited to higher-value markets. Consumers in these new, higher-price markets expect a purer, higher-quality oil and slicker packaging than did traditional Argan oil consumers in the region. More sterile, mechanized extraction and more sophisticated marketing strategies were needed (Lybbert et al. 2002).

The inability of most locals to participate directly in high-value Argan oil markets and the barriers they face to indirect participation in Argan fruit markets due to poor transportation infrastructure have motivated the creation of two kinds of cooperatives: the non-mechanized sponsored by the GTZ association, and the mechanized cooperative established by Zoubida Charrouf with support from the European Union, Oxfam and the Japanese International Cooperative Agency, among others (Lybbert et al. 2002).

The success of this strategy is obvious. Regarding the artisan production chain, in 1999, GTZ was paying €8 per litre of pure, high-quality Argan oil to its 27 members. The oil was tested, packaged and marketed as culinary oil in high-value domestic and international markets.

Lybbert et al. (2002) analysed the participation in the Tidzi cooperative. To participate in the cooperative, a membership fee of 5kg of Argan nuts or €20 must be

paid. Cooperative members are paid US\$2.5 per kilogram of nuts cracked. On average, a woman can extract between 0.8kg and 1.0kg in a single eight-hour workday. This daily wage of approximately US\$ 2–2.5 is relatively low in comparison to the labour options that men face (US\$3.5–4/day), but it is very attractive to women since they have few labour work options. The cooperative sells a variety of final products, including cosmetic oil (US\$3.5/60ml), edible oil (US\$12/375ml) and amalo (an almond-honey butter with Argan oil base) (Lybbert et al. 2002).

Between 1996 and 2006, the price for one litre of Argan oil at the cooperative's gate increased from 35 DH (€3.5) to 200 DH (€20). Half of the price of oil exports is transferred to the women, the rest is used for transportation, the functioning of the association and the commercialization. In 2006, the turnover of the cooperatives was €1 million (10 million DH) (Charrouf 2007a).

On the international market, specialty shops and internet vendors have sprung up, selling the oil for upwards of \$200/litre, with claims that it is the world's rarest and most expensive edible oil (Lybbert et al. 2002).

The supply chain

Production is presently piloted by 100 cooperatives in different regions (see Table 13.2). These cooperatives are bundled in one umbrella association, the Association National des Coopératives Arganières (ANCA), which promotes the interest of the cooperatives. The national association is subdivided into four economic interest groups (Agadir, Essaouira, Taroudant and Essaouira) and one cooperative union, which are responsible for the promotion and the commerce of the Argan oil (Charrouf 2007b). The industrials are also associated in the Association des Industrials (Ouraiss 2007).

Two Argan oil value chains can be distinguished. The distinction is related to the techniques used for extracting the oil: hand-pressed or mechanically pressed (Nill and Böhmert 2006).

TABLE 13.2 Numbers of Argan oil cooperatives in 2007

<i>Province</i>	<i>Number of cooperations</i>
Agadir	21
Choutka Ait Baha	3
Essaouira	12
Inezgane Ait Melloul	3
Taroudant	25
Tiznit	27
Total	100

Source: Charrouf 2007a

Hand-pressed Argan oil chain characteristics

Within the hand-pressed Argan oil chain, ‘producers’ are families who have usufruct rights for the Argan trees and gather the fruits in the wild. The quantity fluctuates considerably depending on location and is ranging between five and 160 40kg sacks per season. The gathering and following peeling process is made by women cooperatives counting 20–60 women per cooperative. In 2005, 30 cooperatives were recognized (Nill and Böhmert 2006).

The first processing step is the drying and storing of the gathered fruits. Afterwards the fruits are peeled and then broken up and the kernels are sorted, roasted and hand-pressed. For the production of one litre of oil, 24 hours are needed with this method. In the treatment phase, the hand-pressed oil is decanted, filtered and bottled into plastic bottles. Producing Argan oil is a highly work-intensive process. Each Argan tree gives an annual yield of 10–30kg of fruit. Around 38kg of fruit yields 2.6kg of kernels, which are required to produce one litre of Argan oil (Nill and Böhmert 2006). A woman’s maximum daily working eight hours non-stop is 21kg fruits or 1.5kg of kernels (Nill and Böhmert 2006).

The distribution of hand-pressed Argan oil is done by the women’s cooperatives, the Union of Women’s Cooperatives of the Arganeraie (UCFA). The part that is not self-consumed goes to the local market and is ordered by urban end producers, grocers, informal street traders or is sold to small private companies in the tourist centres such as Agadir and Essaouira (Nill and Böhmert 2006).

The UCFA sells the hand-pressed Argan oil on the domestic market in containers of 0.75 or 3.75 litres, for a price of €20 per litre under the registered brand name ‘Tissaliwine’. The buyers are big commercial chains or retailers (Nill and Böhmert 2006). The UCFA work closely together with Argand’Or GmbH, a German company founded by Engineer Mohamed El Karz, which provides strict quality control and bottles Argand’Or Argan oil in an USDA-certified and ECOCERT inspected facility in Germany. Argand’Or of Germany is a socially responsible company, pays fair trade prices well above market prices and supports the UCFA cooperatives in development and education initiatives.

Mechanically-pressed Argan oil chain characteristics

For mechanically-pressed Argan oil, the supply of raw material is provided by intermediate traders and wholesalers. To bypass these intermediaries, the Association Ibn-Al Beithar has been trying to build up a ‘Cooperative de Concassage’ (Women’s Cooperatives for breaking open nuts). They want to link the Argan-growing areas with the oil pressed of the semi-mechanized cooperatives, which is also an important factor in terms of organic certification. To ensure the supply with Argan fruits they buy also dried kernels from traders and wholesalers who work with a network of small buyers buying directly from the families (Nill and Böhmert 2006).

In this supply chain, processing is mechanized. The mechanization of Argan oil production began in the mid-1990s with simple shelling and roasting facilities driven

by private enterprises in Casablanca, France, Switzerland as well as by researchers at the various Moroccan universities.

The mechanization increased the productivity enormously as a screw press can produce up to 50 litres of Argan oil per day compared to hand-pressing method with a yield of 0.8–1.0kg oil from one woman in a single eight-hour workday (Lybbert et al. 2002). For mechanical production, 120kg of kernels or 1,720kg of dried fruits are required. About twice as much oil can be extracted from unroasted kernels using mechanical-pressing as by hand-pressing (Nill and Böhmert 2006).

The distribution of mechanically-pressed Argan oil is done by women's cooperatives selling the edible and cosmetic oil directly at the production site to international tourists or by selling it in Morocco via retailers and hotel and commercial chains. In 2004, the first four cooperatives formed the GIE Targanine and in 2005, two further semi-mechanized women's cooperatives were founded. These economic interested groups sell the oil products of the member cooperatives within Morocco and with the main target on the international market. Like the UCFA, they assure quality and organic certification, and help entering new markets (Nill and Böhmert 2006).

Mechanically-pressed Argan oil is sold by private companies under their own names or under brand names whereby the image of oil-producing women in the Arganeraie has found its way into commercial advertising, without these women having any share in the added value (Nill and Böhmert 2006).

The Targanine Argan oil cooperative had revenues of more than \$100,000 in 2000, with 60 per cent of its sales over the internet, mostly to distributors in Europe and North America (Carrouf, personal communication to Lybbert et al. 2002).

The big private oil presses process part of the oil from unroasted kernels into cosmetic products and a smaller quantity into natural remedies. A further part of the oil is sold directly as non-food product and some of the private companies have their own shops in tourist areas. Other companies supply the retail trade, bigger commercial and hotel chains, as well as duty-free shops and airlines. In spite of inadequate certification of the gathering areas, the private companies were given organic certification under EU Regulation No. 2092/91 (Nill and Böhmert 2006).

GIs in the national law

Until 2008, Argan oil of Morocco was not registered as a GI. However the law project no. 25/06 'relatif aux signes distinctifs d'origine et de qualité des produits agricoles et des denrées alimentaires' has been voted in 2007 and offers the adequate legislative framework (Charrouf 2007b). In 2008, the first association producing Argan oil under the new law was founded (l'AMIGHA: l'association pour une IG huile d'Argane) and in October 2008 the code of practice was finalized, with the assistance of the French Association of agri-food cooperatives of the region of Aquitaine (Aubard et al. 2010). Registration as a PGI occurred in February 2010. In May 2010, five cooperatives were certified.

Challenges for Morocco's Argan oil supply chain

One challenge of the Argan oil production is to maintain a certain quality level. As Argan oil is expensive compared with other edible oils, domestic consumers are therefore households with high disposable income in the bigger Moroccan cities. On the regional and national markets, the traditional and semi-mechanized cooperatives sell their edible oil in 250ml or 375ml bottles for €25–40 per litre, while cosmetic oil is sold in 60ml flacons for about €5. In contrast, the private companies sell their edible oil for about €20 per litre and the cosmetic oil for around half the price per flacon of the national market. This oil does not always have the same high quality since it is made from purchased kernels, whose origin cannot always be adequately traced (Nill and Böhmert 2006). However, a code of practice was recently established and may partly solve the problem of quality variations at least for certified Argan oil.

On the international markets, usurpation is a problem. Argan oil is mixed with other vegetable oils but sold as pure Argan oil (Charrouf 2007a). However, it was possible to find chemical identifiers for proving adulteration (Hilali et al. 2007). Other usurpation concerns the use of the term 'Argane' for a perfume or for kernels processed into oil outside the area.

Beside the challenge to maintain a high-quality level as well as the usurpation problems, another serious problem for Morocco's Argan oil producers is the increasing interest in Argan oil production of Spain and Israel. These countries have started to import the kernels to produce oil as well as to cultivate the Argan tree in their own countries.

The gender issue has also become an important challenge. Argan oil production used to be a poor women's business. When production and incomes were low, men were not interested in controlling the major strategic decisions and did not even allow their wives to join the cooperatives. The commercial success has changed their minds and presently, even if most women's cooperatives are still controlled by women, in some cases there are some attempts to get power back to men. Lybbert et al. (2010) observe that households who benefit from the Argan oil boom are more likely to send their girls to secondary school, because the Argan oil business offers them new job opportunities.

Environmental side effects

The commercialization of Argan oil is a highly profitable business and will lead to a general welfare increase of the Arganeraie citizens if a proper supply chain can be built up. The establishment of a GI might be a good way to allow locals to participate on the commercial success. However, a lot of work has to be done to avoid negative effects for the environment and poor households. The traditional Argan oil extraction is quite labour intensive, and a GI based on these traditional production methods would increase job opportunities and income to the women involved. On the other hand, the mechanical production will be necessary to satisfy the increasing international demand. The development of a collectively-driven action will need great efforts of

local associations, government and international NGOs and a highly participating approach to ensure a fair distribution of the potential value-added and thereby not negatively affect the environment.

The Arganeraie region is currently threatened by strong environmental damages. The widespread agri-industrial farming of the Souss plain area, deforestation of large areas to clear space for building land, roads and other infrastructures, removal of firewood and timber, one-sided use of the tree to obtain fodder, and widescale felling by forestry and local authorities have led to a drop in groundwater level, the depletion of flora and fauna and the weakening of their power to regenerate, and initial desertification. Since 1998, the region was recognized worldwide, through UNESCO, as the Arganeraie Biosphere Reserve (Nill and Böhmert 2006). The greatest threat to most of the Argan forest is due to intensifying livestock browsing and grazing. Livestock numbers have increased substantially (Lybbert 2000) and signs of overgrazing and overbrowsing, especially in the off-agdal season, are everywhere in the Argan forest (Lybbert et al. 2002).

One of the problems for environmental conservation in the Arganeraie is the current legal situation of land tenure and usufruct rights (see Figure 13.2). If forest conservation should be successful, some legal changes might be necessary as the tenurial arrangements also shape locals' response to incentives (price incentive due to commercialization of Argan oil) to protect trees. The distribution of agdal rights in the Argan forest does not rely on official titling procedures and, in practice, is not always respected. Locals commonly cultivate barley, an important stable food, around the Argan trees in their agdals partly as a public declaration of their agdal rights and partly because they have no other cultivable land available. Even if barley cultivation

		Spatial dimension		
		State Forest land		Private land
		Agdal	Azroug	
Temporal dimension	Jan	Communal grazing (and other 'ancestral' rights)		Individualized cultivation, grazing, etc.
	Feb			
	Mar			
	Apr			
	May	Individually-execised harvest rights	Intensive communal grazing	
	Jun			
	Jul			
	Aug			
	Sep			
	Oct	Communal grazing (and other 'ancestral' rights)		
	Nov			
	Dec			

Source: Lybbert et al. 2002

FIGURE 13.2

secures tenure in the short term, in the long run this will hinder the natural regeneration of the Argan tree and leaching soil nutrients. Lybbert et al. (2002) assume that the desire to establish greater security over one's agdal via barley cropping will presumably intensify as the value of Argan fruit increases. But even if locals who seem willing to consider planting Argan seedlings would only do so on their private plots as in the off-agdal season, locals are not permitted to exclude others from their agdal tracts, and seedlings are not able to be protected against neighbours' grazing animals (goats or camels). Nonetheless, an increasing amount of locals started to construct permanent barriers around the agdals, with the result that formerly open access forest is (even if not legally fixed) privatized. In the short term, this will preserve trees in the agdal plots but exert pressure on the azroug lands. In the azroug areas, a classic open access resource problem occurs; everyone has an incentive to exploit the tree but no one has an individual incentive to conserve it. In addition, the common property management have left azroug trees generally less productive and more degraded than agdal trees. The resource is overexploited and no incentive exists to conserve the forest, even if price increases with the commercialization of the oil. Lybbert et al. (2002) conceive that the market for agdal rights will become more liquid as the value of these assets increases. Relatively wealthy households are expected to benefit most from higher fruit values and invest in yet more agdal rights, leaving poor households with access only to increasingly degraded azroug forests. This again would further impact the degradation of the azroug trees as poor households would have strongly limited access to agdal rights and would need to survive from less efficient azroug trees.

Argan reforestation projects are plagued with exceptionally low success rates (Lybbert et al. 2002). This is due to several factors: (i) the tree's extensive root system extends deep into the soil at a remarkably young age, making transplanting difficult; (ii) Argan seedlings are extremely vulnerable to various fungi (Bani-Aameur 1997); (iii) the present value of seedlings is too low (no nuts for the first three years), labour-costs of tree establishment and tending, risk aversion on incurring sunk costs in the face of uncertainty (Chavas 1994) to give an incentive to locals to plant new trees.

A survey by Lybbert et al. (2002) assessed that locals prefer olive trees or carob trees that are as well biophysically-suited to the arid conditions of the Argan forest. High-density forest residents were practically the only ones to express a preference for Argan trees. No household in low-density areas, where the forest is most threatened and where Argan fruit prices have increased significantly, even mentioned the Argan tree in response to an open-ended question. So the authors concluded that Argan oil commercialization has prompted no spontaneous local reforestation, due most likely to the tree's slow-growing biology. This situation can potentially be solved by collective action within a GI supply chain. Lybbert et al. (2002) show that, due to the establishment of the associations, women now have an incentive to preserve existing trees to be able to deliver high-quality nuts that otherwise would not be taken by the association.

However, the social and cultural context also affects the success of a potential GI establishment. According to the study of Lybbert et al. (2002), locals consider the Argan tree 'wild', and seem to have never invested much time or effort in tending

Argan trees. In contrast, domesticated olive and carob trees do capture the locals' attention and investment. Berbers' routine denial of responsibility for Argan trees diminishes the likelihood of direct individual investment in them. If this tradition can be changed, and Argan trees are valued higher by a GI, remains to be seen. Another problem surveyed by Lybbert et al. (2002) that may limit the success of a GI is the fact that livestock are the most desired form of household wealth in the region. Relatively poor households typically invest in small ruminants such as goats and sheep, whereas relatively wealthier households hold much of their wealth in larger livestock such as camels, mules and cattle. Given that non-farm options are scant and crop cultivation offers poor returns in the Argan forest, livestock might continue to be the primary household investments. The carrying capacity of the system limits the ability to expand herd sizes without causing resource degradation. But in any case, when evaluating the effect of an Argan oil GI, one should not forget to evaluate the impact on the livestock owners.

In a recent survey, Lybbert et al. (2002) conclude that the Argan boom has benefited some rural households. But as households improve their earning through Argan exploitation, they reinvest in goats, the primary contemporary threat on the forest. While locals are keeping their goats out of Argan trees during the harvest, they may also be resorting to more aggressive harvesting techniques, such as hitting trees to harvest more fruit. The boom has made households vigilant guardians of fruit on their own trees, but has not incited investments in longer-term tree and forest health.

Conclusion

Argan oil is an impressive success story. The product that was traditionally used by women and sold locally has become a worldwide famous product in just a few years. Beyond this commercial success that has led to an increase of women's salaries, different positive side effects have included new scientific knowledge on chemical properties of the oil, technical improvement of processing practices and construction of a strong collective organization based on women's cooperatives and commercial groups.

The supply chain will have to face the challenge of increasing production without losing the artisan characteristics of the product. Mechanization of certain steps of processing, such as kernel-crushing and oil extraction that were traditionally made by hand by women, will have to be driven carefully in order to avoid a drift to lower quality. This technical innovation also opens the gender issue, extracting being a female activity until now.

Regarding environment aspects, the case study highlights specific problems in countries with complex systems of land usage and ownership. When there is land tenure insecurity, long-term projects such as Argan tree plantation are difficult to realize.

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14

RWANDA: COFFEE

Thierry Coulet¹

Introduction

Coffee is one of the major agricultural products in Rwanda, accounting for more than 50 per cent of the country's exports. The Government of Rwanda is following a proactive policy of strengthening the supply chain, based on a quality strategy. The main focus of the policy currently pursued in the coffee sector is thus to improve the quality of production in order to position coffees of Rwanda on the high-quality, specialty coffee market. This strategy is implemented by the Ministry of Agriculture on the one hand, but also by OCIR-Café (Office des Cultures Industrielles du Rwanda), or Coffee of Rwanda Development Authority, which assists in this process.

According to OCIR-Café, quality is to be improved through the set-up of washing stations, with the aim of developing exports of green or even roasted coffee, to the detriment of the export of raw, semi-washed coffee, which still accounts for most coffee exports today.

The Ministry of Agriculture also promotes coffee processing in washing stations, considering this operation to be a pre-condition for producing better quality coffee and, consequently, obtaining a higher price on export markets. A regional analysis also supports this strategy. Only 22 per cent of Rwanda coffee production is exported in the form of 'fully washed' coffee, whereas this proportion for Burundi is as high as 80 per cent, and in the case of Kenya the percentage reaches 90 per cent. In order to proceed in this direction, Rwanda definitely needs to invest in the creation of washing stations.

The Ministry of Agriculture also promotes the export of a finished, roasted product, but this development requires large investments in infrastructure. Furthermore, roasting is very energy-intensive.

Finally, such a strategy requires training of farmers and their representatives, especially in the development of business plans, as well as ongoing support to coffee-growing

cooperatives. This policy is implemented, notably, through the USAID-funded project 'ADAR' (Agribusiness Development Assistance to Rwanda) and also takes shape in the form of organization of international competitions in Rwanda, such as the 'Cup of Excellence' competition. According to the Ministry of Agriculture, the development of geographical indications could well be part of this process.

GIs legislation

In Rwanda, the legislative framework for registration and protection of geographical indications consists of Law No. 31/2009 of 26 October 2009 on Protection of Intellectual Property, and more specifically Articles 165–176, the former concerning the filing of geographical indication, including setting conditions that must be met to allow the protection of a geographical indication. These include recognition of a specific quality, and of reputation of the product on the basis of this quality, or on the basis of any other characteristic. A Ministerial decree sets the cost of geographical indication registration by the Rwanda Development Board (RDB) at the amount of 50,000 Rwandan Francs (RWF)², the same cost as filing a trademark.

It is noteworthy that the applicant is responsible to develop the specifications relating to the geographical indication; these specifications are then subject to the approval of the Office of the Registrar General (ORG). Producer groups, however, may request assistance from ORG in the development of these specifications and therefore ORG, along with other institutions, could be associated with this phase.

According to the RDB, as geographical indication concerns a product collective, contrary to a patent or trademark, which clearly belong to an individual producer, management by the public authority should be preferred. In this context, the status of the applicant for a geographical indication is not limited by law and may well be an individual or a legal entity, public or private. The law does stipulate that a geographical indication must benefit 'producers' and this could constitute a condition regarding the status of the applicant.

In Rwanda, Law No. 31/2009 is the first to integrate the issue of protection of geographical indications and establishes a '*sui generis*' protection system. The law was drafted with the support of experts from the World Intellectual Property Organization. Integration of geographical indications in the law is part of the overall strategy for economic development of Rwanda, which focuses on the development of local production. An overall policy paper was prepared by the Ministry of Commerce prior to drafting this law.

This legal framework was developed also with a view to meet Rwanda's international obligations as a member of the World Trade Organization and, therefore, signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The legal framework's provisions on geographical indications are very similar to the relevant content of the TRIPS Agreement.

Application of the law on intellectual property protection is the responsibility of the Rwanda Development Board (RDB), an agency itself under the direct authority of the Presidency of the Republic, which has four departments: one competent in

matters of tourism and conservation of heritage; one for information technology; a department responsible for human capital; and, finally, an entity in charge of trade and crafts and promotion of investments. Within this latter department, the ORG has jurisdiction over the registration and protection of geographical indications. The ORG is composed of three sectors in charge of company registration, registration of mortgages and intellectual property respectively.

It should be noted that under Law No. 31/2009, management of the geographical indication is under the responsibility of the applicant. ORG could offer arbitration of dispute concerning the implementation of a geographical indication but has no authority to intervene directly in its management. A specific agency should thus be created for this purpose.

Given the very recent entry into force of the law, no product in Rwanda has been granted protection of its geographical indication to date, neither is any investigation underway for the protection of the geographical indication of a product.

It should be underlined that many coffees are already sold under names referencing a geographical origin; these names have been registered as trademarks prior to the adoption of the law. This is the case of 'Maraba coffee' or 'Kivu coffee'. About a dozen trademarks would be affected. These trademarks are the property of private corporations, cooperatives or OCIR-Café. Filing a geographical indication under the same name could well conflict with the exercise of intellectual property rights attached to those trademarks which are also often protected on various export markets.³

Under Article 13 of Law No. 31/2009, the RDB ensures promotion of protection of geographical indications in Rwanda. This promotion is based on an information campaign and awareness-raising targeting producers, and builds on the findings of an identification study undergone by the Ministry of Commerce, to investigate products eligible for protection of geographical indication.

Although implementation of protection of geographical indication of a product requires a thorough analysis, it appears at this stage that many products of Rwanda, according to the RDB, would be qualified for such protection, particularly the coffees originating from various regions, but also tea, fruits and fruit juices, wines and flowers.

Another fact worth taking into account is Rwanda's ongoing accession process to the ARIPO (African Regional Industrial Property Organisation), which entered into force on 24 September 2011.

Coffees of Rwanda: Natural proprieties and reputation on international markets

Coffees of Rwanda: Varietal and natural characteristics

The quality of coffee, like most agricultural products, largely depends on geological, climatic and biological features. All these specificities have impact on the formation of the plant and, ultimately, on the particular organoleptical qualities of the product. As in the case of wine, specialists and connoisseurs can actually recognize the geographical origin of a coffee based on its characteristic flavour.

From this point of view, coffee of Rwanda seems particularly distinguishable and recognizable. Its particular quality is most often attributed to the following factors:

- **Variety:** Several hundred varieties of coffee are available, but only three are grown throughout the entire territory of Rwanda. These varieties are: Bourbon Mayaguez BM 71, Bourbon Mayaguez BM 139 and Jackson. All three belong to the Arabica family. It should be noted that none of these varieties is endemic to Rwanda. Two of them, as it seems, originate from the island of Réunion and the third, Bourbon Mayaguez BM 71, could come from Ethiopia and have been introduced via the Congo, from the region of Bukavu. These varieties are also grown in neighbouring countries, such as Kenya, Tanzania and Burundi.⁴ It should be noted at this point that, according to several interlocutors, coffees from Rwanda and Burundi have very similar characteristics. These varieties are called 'long' in contrast to other dwarf varieties.⁵
- **Soil:** Coffee of Rwanda is mainly grown on volcanic soils. This is particularly the case of coffee grown on the shores of Lake Kivu and in the south. In other areas, coffee is grown on combined soils of schist, clay and sand, which also favour this type of culture. Each soil type is associated with a particular degree of acidity, which has been identified as one of the main contributors to the organoleptical qualities of coffee.
- **Altitude:** Coffee is cultivated in Rwanda at altitudes between 1,200m and 2,000m, even from as low as 1,000, but the larger part of cultivations are at between 1,650m and 1,800m. This altitude is a specificity of the cultivation of coffee in Rwanda, compared to other countries in the region. Altitude has impact on the physiology of coffee, including its flowering. More specifically, the altitude leads to slow fruiting and a progressive maturation that result in turn in a particular degree of acidity of the fruit, the acidity itself having a major impact on the formation of specific flavours of coffee.
- **Terrain:** Coffee of Rwanda is often produced on slopes with ideal exposure to sunlight.
- **Rainfall:** Reaches levels of more than 1,000mm/year.
- **Surrounding vegetation:** It is common to distinguish coffees into coffee produced under shade or without shade. Although production under shade is usually associated with lower productivity, due to the lower density of coffee trees, it appears that the average productivity per tree is higher when it is grown under shade, thus compensating for the lower density and resulting in equal or higher production per hectare. In addition, the quality of coffee produced under shade appears to be superior to that of coffee grown without shade. This is attributed to the slow maturation that occurs under the shade, which creates an effect of artificial altitude.

The organoleptical qualities and granulometry specific to coffees of Rwanda have been studied through laboratory measurements performed by OCIR-Café.⁶

The Institut Supérieur Agronomique du Rwanda (ISAR, Higher Institute of Agronomy of Rwanda) conducts research on new production technologies and improvement of production, viewing to increase production volumes and quality. More specifically, ISAR is conducting a multi-annual coffee research programme,

aiming to determine those varieties of coffee most suitable to the soils, altitude and various natural proprieties specific to the regions of Rwanda. Technologies developed are made available to the OCIR-Café, which in turn disseminates them to producers.

These studies are focused on various aspects: the resistance of different varieties towards various types of pests;⁷ optimum planting density and its associated fertilization, which may vary according to soil type, climate and varieties;⁸ pest control and research into eco-friendly pesticides; the adaptation of varieties to different geological and climate; on agro-forestry species that can be associated with coffee; cultivation of other, perennial or annual⁹ crops associated to coffee; one of the most frequently associated cultivations is the banana, especially in Rwanda as many coffee-growing farms have been developed on land previously used for banana production.¹⁰

According to the ISAR, the Rwandan government focuses on developing the production of coffee as a monoculture, which can lead to locally replacing banana plantations with coffee plantations. Yet the ISAR considers that the combination of coffee with other plantations, especially the banana, brings clear mutual benefits, though precise details remain to be determined. Research is underway on this subject and may go on for several more years, given that for some perennials, productivity effects cannot be measured until four or five years after introducing the radical change in conditions of exploitation.

The ISAR also ensures the creation of cultivars and seed production, diffused exclusively to producers through OCIR-Café after having tested the main characteristics of particular cultivars and their resistance to local pests. Only after two years of testing does OCIR-Café nominate cultivars as suitable for sustainable agriculture and then ensures reproduction in order for them to in turn become available to cooperatives. Cultivars are subject to certification by RADA, the Rwanda Agricultural Development Authority.¹¹

Exploitation, processing and local expertise

For OCIR-Café, the quality of the final product depends to a varying extent on agricultural production conditions per se (about 40 per cent of the final quality), on the various processing operations coffee undergoes (washing, hulling, roasting for about another 40 per cent) and, finally, packaging.

According to ISAR, coffee tree management has a decisive impact on the quality of coffee. The main operations of this management are the following:

- mulching, or ground covering around the coffee tree, required throughout the year but especially important during the dry season in view of which it allows the formation of a water reserve;
- size of 'production';
- general maintenance, illness management and fight against pests; and
- harvest: must be done early in the period of maturity.

Processing, washing, fermentation control and hulling also have a vital impact on coffee quality to the point that, according to ISAR, the quality of the final product would primarily derive from the processing of coffee. According to the same organization, there is local know-how in terms of coffee tree management in Rwanda and, apart from that, there are 'progressive' farmers applying new management technologies.

The coffee season runs from late February to late June, including all phases from harvest to processing and export.

Coffee cultivation is sometimes a secondary activity of farmers mainly engaged in other cultivations, or even of individuals engaged in other non-agricultural economic activities. The quality of coffee produced significantly fluctuates, depending on the particular circumstances.

The processing speed of the cherry also seems to be a key factor in the quality of the coffee produced. Indeed, the cherry should be treated not later than four hours after being picked to ensure the best value of its organoleptic qualities. It is therefore essential that the travelling time between the farm and the washing station is as short as possible.¹² It should be noted that about 5kg of cherries have to be treated to make 1kg of green coffee, the ratio ranging between 1/4 for the best and 1/6 for worse cherries.

Two types of machines are used in coffee washing:

- 1 'Conventional' machines. With a processing capacity of between 100 and 400 tons, these are the same type as the machines used in neighbouring countries, Kenya and Tanzania;¹³
- 2 'Non-conventional' machines. Originally from South America, these have the advantage of being more environmentally friendly as they consume less water. These machines are also using a somewhat different process because fermentation and removal of mucilage are performed at the same time.

It should be noted that processing of coffee cherries varies among countries. In Rwanda, like Burundi, coffee undergoes a double fermentation, the first one being dry and the second under water, while producers of Kenya conduct two dry fermentations and those of Ethiopia two under-water fermentations. These differences in processing also have, according to many interlocutors, a significant impact on the final outcome and the quality of the commercialized product. However, on the whole, the know-how implemented in Rwanda is generally not regarded as truly specific, as practices have been acquired and imported several decades ago.

Identification of the production area and existing projects concerning GIs

Generally speaking, there are four coffee production regions in Rwanda which are associated with quite distinct characteristics: Kivu (West), North, South and East.¹⁴ According to ISAR, all these regions have different features that favour the coffee production: warm and rich subsoils in the case of West and East, where the average altitude of operation, between 1,400m and 1,500m, is also lower. Only few areas

are cultivated in the southern region, at an altitude of between 1,650m and 1,700m, where the soil at some areas is too acidic to suit the cultivation of coffee.¹⁵ It should be noted that all three varieties grown in Rwanda are to be found in these coffee-growing regions. However, according to ISAR, the quality and production yield depend more on the producer than on the production region and its natural features.

The main differences between coffees originating from different regions of Rwanda are sufficiently perceptible to be appreciated by discerning consumers and national and foreign 'coffee shop' chains. Thus, Rwandan chain 'Bourbon Coffee Shop' distributes various coffees under the names of Kivu, Maraba and others, referring to different production regions in Rwanda.

It should be noted that the Spread programme, jointly implemented by the American agency USAID and OCIR-Café, includes a section for the development of a designation of origin for Rwanda coffees and more specifically Maraba coffee. This project involves a process of identifying the physical origins of the inherent quality of coffee in this region. A report on the subject of geographical indications is expected by OCIR-Café by the end of 2011. Naming proposals should then be confirmed by a national forum.

Similarly, a project is underway, involving the *Centre de Coopération Internationale en Recherche Agronomique pour le Développement* (CIRAD, French Centre for International Cooperation in Agronomic Research for Development), and ICRAF, the International Center for Research in Agroforestry, for the development of designation of origin coffees from Rwanda. This project is currently in search of financing.¹⁶

It is also worth mentioning the Cafnet project carried out thanks to aid from the European Union and another project with the support of the Belgian Cooperation aiming at developing an environmentally friendly coffee production that can be labelled as an organic product. Another initiative, undertaken by the retail chain Méo based in Lille, France, has also developed a 'fair trade' label in connection with the COOPAC cooperative but it should be noted that the market price in New York has now exceeded the price agreed in the fair trade convention, rendering it somewhat obsolete.

No private producer has taken the initiative to protect the geographical indication of their product but it must be emphasized that, as noted earlier, many coffees from Rwanda are branded with reference to a geographical indication. This is the case of 'Kivu Bourbon' coffee marketed by COOPAC cooperative or 'Maraba coffee', which is both a brand and a company name.

Most actors agree that a geographical designation of coffees from Rwanda should at the same time identify both these regional characteristics and the specificity of coffees from Rwanda in relation to its neighbouring countries. Thus, the preferred designation would be a double name such as 'Kivu/Rwanda Coffee' or 'Maraba/Rwanda Coffee'. The generic designation 'Coffee of Rwanda' could be considered for coffees from other growing regions without equally strong characteristics.

The Ministries of Agriculture and Commerce would prefer a principal designation of 'Coffee of Rwanda', which could benefit a larger number of producers and cover a larger volume of production, while allowing for certain specialized designations, such as 'Kivu coffee', where a specific recognized quality is attributed to a region of production.

According to ISAR, however, it is not possible to speak of 'Coffee of Rwanda' because of the strong specificities and differences between coffees coming from different regions.

According to several interlocutors, besides Kivu and Maraba, certain coffees from the northern regions could be particularly identified and, more specifically, coffees from Rulindo and Gatiantye, as well as coffees from the southern region, particularly those from Niamagabe and Huye.

It is interesting to note that almost each and every washing station is aware of the stake of a geographical indication and attempts to expand its geographical identification as a trademark.

Reputation of coffees of Rwanda in their main export markets

Coffee from Rwanda is widely recognized as a premium coffee in its main export markets but also in other producing countries of the region. This recognition was strengthened during the first decade from 2000 through the organization of international competitions in Rwanda, particularly the 'Golden Cup', held in 2007, and the 'Cup of Excellence'. The latter was organized in 2008 and 2010 and should be back in 2011. Both competitions have the advantage of involving an international jury, which is obviously favourable to the recognition of the quality of Rwanda coffee abroad.¹⁷

The 'Cup of Excellence' competition is organized between the washing stations. The auction held in its outcome shows that quality premiums of a very high amount are attributed to coffees ranked among the top 20 in this competition. Thus, in 2008, the coffee variety that won the competition was sold at a price about US\$40/kg, against about US\$3.50/kg on average. In 2010, these prices were US\$50/kg and US\$4.00/kg, respectively. The quality premium thus results in an increase by a factor greater than ten times the price of the commodity. These premiums remain significant, although lower, until the 50th place in the competition.¹⁸

The main characteristics of Rwandan coffee recognized by connoisseurs and specialists are in terms of taste, acidity and body. These characteristics are correlated with the production traits mentioned above, especially with the variety grown, the altitude of operation, the type of soils (volcanic) and the quality of processing, i.e. essentially washing.

These organoleptical characteristics are sometimes considered to resemble those of coffees from Kenya, but may nevertheless be recognized as individual. However, they are considered identical as to the characteristics of coffee produced in Congo's Lake Kivu, the latter being produced on the same soil and under the same conditions as Rwanda coffees in this region. They are also very similar, though with slight differences, to the qualities of coffee from Burundi.

For the Rwanda Coffee Federation, reputation of the national coffee on international markets is greater than that of coffees from neighbouring countries, a fact that was confirmed by the scores obtained by certain Rwandan coffee lots in the last edition of the 'Cup of Excellence' competition, several of which exceeded the score of 90/100 which was considered exceptional.

It is interesting to note that a number of coffees regularly rank among the first places in these competitions. We observe a predominance of coffee varieties from the northern and western regions in particular, with six out of the top ten coffees coming from only two districts and the best coffee originating from the Rutsiro district (Kivu). It should be noted that OCIR-Café has performed soil and precipitation analyses in an attempt to scientifically determine the natural origins of the quality of consistently winning coffees.

Quite paradoxically, Maraba coffee, although ranked lower than others in international competitions, now appears to have the strongest national and international reputation, especially in Great Britain and Japan.

According to COOPAC, coffee from Rwanda enjoys an established reputation in its main export markets, especially the US, Japan, Scandinavian countries, the UK and, to a lesser degree, Belgium, France and Australia. According to OCIR-Café, the Japanese market in particular is very demanding of coffee from a specific district and the high demand for coffee from this particular district has led to the intensification of coffee planting and has had a real socioeconomic impact.

Analysis of the competitive structure

Sectoral analysis

The coffee production sector consists of a limited number of trades: coffee cultivators, cooperatives, washing stations, hulling plants, roasting plants and exporters. The sectoral characteristics of each of them are detailed below.

Coffee cultivators

Coffee cultivators, or producers or even growers, are individual producers operating mostly very small plots (180 trees and 0.5ha on average¹⁹ while the Federation considers it necessary to operate land of at least 600ft in order to move above the poverty line). These coffee cultivators are often grouped in cooperatives.

Holdings with less than 600 plants operate on a purely family model, while employment of an employee is conceivable beyond this number.

Rwanda currently counts 394,206 farmers who operate a total of more than 72 million feet²⁰ on an area of 28,826ha. The larger plots operated by a single producer reach a surface of about 60ha, but it is very rare that the holding is over 1ha.²¹ Plantations of over 10ha represent about 1 per cent of the cultivated area. Rwanda counts, however, some large holdings, especially in the east of the country. The state promotes the concentration of small producers and the emergence of large holdings through its 'Land use plantation' policy that has been implemented since 2009.

The tendency of natural concentration observed over the years has been interrupted. However, OCIR-Café continues to encourage the concentration of holdings on the

basis of shared services: each producer retains ownership of their holding but shares with their neighbours services such as soil treatment, insect control, etc.

Cooperatives

Cooperatives, which regroup individual producers or, in some cases, groups of producers, collect and sell their produce to washing stations or, in some cases, carry out washing themselves.

There are about 125 coffee-growing cooperatives in Rwanda, but their number is very unstable because of the rapid appearance and disappearance of cooperatives.²² Of these 125 cooperatives, 84 are themselves members of unions grouped in a national cooperatives federation,²³ the Coffee of Rwanda Cooperatives Federation, created in 2009 and housed in the premises of OCIR-Café. The federation is involved in all programmes carried out by this organization, including the Spread programme mentioned above. Rwanda currently accounts for 15 coffee-growing cooperatives unions, 14 of which are members of the Federation, with the 15th one being under accession.

A cooperative must include at least seven producers, the largest grouping nearly 3,000 producers with an average number of around 500 producers per cooperative. A union, for its part, must include at least three cooperatives. In principle, there is a union per district, but some districts may count two unions following the consolidation of municipalities that already had their union.

It appears that cooperatives often begin to function as informal associations that do not make their activity official until after a certain period of operation.

Cooperatives usually buy coffee cherries from producers at a pre-determined price based on current market conditions, then negotiate the product, after washing, depending on market conditions that may have changed in the meantime. In case of profit, the cooperatives pay a rebate to producers. Some private washing stations also practice these rebates, but more rarely.

The strategic objectives of the National Cooperatives Federation are professionalization and the improvement of the welfare of coffee cultivators. More specifically, the Federation aims to:

- promote increased production and improve quality;
- strengthen the managerial capacity of producers and cooperatives;
- make the voice of coffee growers heard at decision-making bodies; and
- ensure the best possible marketing conditions for coffee and work toward stabilizing the market. This action involves, in particular, tracing contacts with industrial and commercial buyers so as to prevent that the coffee markets fall prey to speculators. The Federation helps the establishment of contacts between washing stations of cooperatives and foreign importers, in particular.

In addition to these strategic objectives, the Federation also wishes to encourage the organization of producers into groups. Today, only about 20 per cent of nearly 400,000 cultivators are members of a cooperative. The Federation deems it is necessary to help small producers join a cooperative.

Box 14.1: The case of COOPAC

COOPAC (*Coopérative pour la promotion des activités café*), the Cooperative for the Promotion of Coffee Activities, is one of the largest cooperatives in the coffee sector in Rwanda. It brings together about 2,200 producers who operate in two districts on the shores of Lake Kivu: the districts of Rubavu and Rutsiro. Other cooperatives are active in the Kivu region but are of a much smaller size.

The cooperative consists of small holdings, of 0.5 acres at the most, with the exception of those run by its chairman, Emmanuel Rwakagara, whose holding covers about 15ha.

COOPAC owns four washing stations and a hulling plant in Gisenyi.

Like other cooperatives, COOPAC buys the coffee cherries from producers and provides the washing operation. But COOPAC also ensures the operation of hulling and markets the product by directly exporting it. It also carries out the operation of roasting for the local market. COOPAC is thus the only cooperative present on the entire value chain of coffee and is the first coffee-growing cooperative in Rwanda in terms of exports, with about 45 containers exported annually, against only four for the rest of the coffee-growing cooperatives. This activity allows COOPAC to illustrate a turnover of approximately US\$3 million, against an average of US\$200,000 for other cooperatives.

COOPAC exported about 800 tons of coffee in 2010, of a total of about 18,000 tons of coffee exported by Rwanda. It stood in fifth place²⁴ among coffee exporters in the country after four private hulling companies, but in first place for exports of so-called 'specialty' coffee.²⁵

COOPAC implements a strategy of active development and controls two quality laboratories in Gisenyi and Kigali.

The cooperative is a member of the association of coffee exporters of Rwanda and the Private Sector Federation (*Fédération du Secteur Privé*).²⁶

Washing stations

Rwanda counts 187 washing stations. Their number has increased since 2006. These washing stations transform coffee cherries into parchment coffee or 'fully washed' coffee before selling it in turn to hulling plants, in case they do not have such facilities.

Washing stations carry out a series of operations before and after the washing itself, namely:

- Selection of ripe cherries and disposal of damaged coffee beans by a method of water filtering;²⁷
- Pulping, which consists of the mechanical elimination of the coffee skin and cherry;
- Fermentation, which is achieved by submerging coffee beans in a water bath for at least 24 hours, and results in the removal of mucilage;
- Washing, which consists of emptying and then refilling the water tanks;

- Grading, conducted according to the channel technique, which is to sort the seeds according to their weight, the lightest swept first in a stream of water being considered of lower quality;
- Soaking, which is a last passage of coffee in water; and
- Drying.

Washing stations are SMEs employing up to 50 people for the season (March–August). Some 80 to 90 of these washing stations belong to cooperatives, while the rest of them belong to private companies. In most cases, a private company controls only one washing station but the same company can sometimes own two or three such stations.²⁸ Large private corporations control one or more washing stations and a hulling plant.²⁹

These washing stations can be distinguished into large stations that can handle volumes of more than 100 tons per year, also called ‘conventional washing stations’, and smaller stations. The large washing stations are 81 in number, while there are 106 smaller ones. These 187 washing stations have a total processing capacity of 13,000 tons per year but their production is limited to only 4,200 tons. This gap gives, for OCIR-Café, a measure of the progress still to be made to increase local processing. This is partly due to the fact that washing stations face significant difficulties accessing financing but, in some cases, they also lack technical capacity.

A number of these washing stations are in the hands of cooperatives and pay a rebate to producers when they record profits, a practice that, in good times, does not fail to attract to the washing stations producers who tend to turn more towards private washing stations outside these periods.

It should be noted that some producers carry out this first process themselves and produce what is described as semi-washed coffee, considered to be of lower quality than that resulting from washing stations.³⁰

Hulling plants

There are ten hulling plants, the seven largest of which are all located in Kigali. Hulling consists of removing the skin of the coffee grain so as to get a green coffee suitable to be sold. These hulling companies generally export coffee in the form of green coffee.

Roasting plants

There are still few roasting plants in Rwanda, and these are often small in size. Their production is also mainly destined for the local market with very small amounts of coffee being exported in the form of roasted coffee. Some producers roast their own coffee.

It should be noted that the Spread programme, already mentioned, also aims to the development of local roasting.

OCIR-Café performs roasting operations intended solely for the local market. Five chains of coffee shops, three of which belong to the same brand, Bourbon Coffee

Roasters, are also coffee roasters. Some cooperative or private washing stations, including those of COOPAC, also carry out roasting, but their capacity in this regard is insignificant.

Besides its own activities, OCIR-Café is also committed to a project for the development of local roasting participating in the creation of a joint company, the Grind Farmers Company, with the support of various international foundations, including the Bill Clinton Foundation. This joint venture has plans to build a roasting plant in Kigali with a capacity of about 1,000 tons per year, with the bulk production destined for exportation. A preliminary market analysis has demonstrated the interest of export markets, particularly those of East Africa, Europe, the Middle East and the US, for roasted coffees in Rwanda.

Swiss investors have also recently focused on roasting and bagging in Rwanda, contributing to the achievement of higher added value in the country. More generally, since 2008, there has been a sharp increase in the capacity of roasting and grinding coffee in Rwanda.

Exporters

Rwanda counts 48 coffee exporters, with an export activity largely concentrated in the hands of the first five or six exporters who carry out about 85 per cent of total exports of coffee from Rwanda. The main exporters are the private companies PAL Rwanda, which export roasted and bagged coffee, Rwacof, Rwandex, Rwanda Coffee Industries and various cooperatives, including COOPAC.

For all these companies, exports of semi-washed coffee far outweigh 'fully washed' coffee exports, with COOPAC constituting the only exception in this regard.

The crucial role of some other players in the development of this sector, such as carriers, banks and insurance companies, should also be mentioned, although they do not actually belong to the sector of coffee production.

Estimated production and export volumes

Coffee still accounts for more than 50 per cent of Rwanda's exports, although tea and some minerals have seen their share in total exports significantly increase in recent years.

In 2010, coffee exports accounted for a volume of about 18,000 tons. In any event, Rwanda will remain a small coffee producer, which only increases the importance of a quality-oriented strategy that could be based, inter alia, on the development of geographical indications.

Sector organizations

Public and semi-public organizations

OCIR-Café, formerly named *Office des Cultures Industrielles du Rwanda* (Office of Industrial Crops of Rwanda), now the *Office Rwandais de Développement du Café*

or Rwanda Coffee Development Authority, holds a special place in the coffee sector, since this public body plays a regulatory role in the sector while intervening at the same time in the production, processing and export of coffee.³¹ More specifically, OCIR ensures the promotion of coffee cultivation in Rwanda and representation in international negotiations on coffee, regulation and coordination of the sector, quality control and advice to stakeholders. Its primary role today is to support production, processing and marketing.

Apart from OCIR-Café, one should mention the roles played in the development of the sector by the Ministry of Agriculture and in particular its Directorate General of Planning as well as the Ministry of Trade and ISAR, which is in charge of agricultural research programmes on coffee. Also noteworthy is the important role of the Spread programme, implemented by the American agency USAID in cooperation with OCIR-Café and the University of Texas, aiming to improve production processes and the quality of coffee produced.

Private sector organizations

The coffee sector in Rwanda is structured into many local cooperatives and some national federations, namely:

- National Coffee Cooperatives Federation, member of the Chamber of Agriculture of the Private Sector Federation (PSF); and
- the National Federation of Coffee Exporters.

Price developments

It should be noted that a coffee market is a semi-regulated market in Rwanda. Indeed, a minimum price to producers is annually set by the Ministry of Agriculture and OCIR-Café in consultation with the entire industry on the basis of prices prevailing in international markets, and especially on the spot market of New York, although coffee from Rwanda is not directly traded on that market.³² Prices in this market can vary daily from ± 2 –3 per cent.³³

The coffee season runs from late February to late June, including all phases from harvest to processing and export. In practice, a meeting is organized in January by the Ministry of Agriculture with the participation of cooperatives and exporters to fix the minimum price paid to producers.

In 2011, the price was established to 161 RWF/kg of cherries, but in mid-March, the actual price exceeded 200 RWF/kg in certain cases.

A kilo of cherries has traded in 2011 at a price of about 180 RWF/kg on average, ranging between 125 and 200 RWF paid to growers, with the trend being on the rise due to low global stocks and bad harvests in Brazil and Colombia following a bacterial attack suffered by some areas of production in these countries. Thus, a kilo of cherries trades between 165 and 250 RWF. Prices paid to various producers can vary quite significantly over the same period, and even more so if one compares the

prices of ordinary coffees to those of first-rank coffees. Prices paid to producers by washing stations also vary depending on quantities purchased and the market outlook.

In mid-March 2011, the export price stood in a range of US\$3–4/kg for green coffee.

Quality differences between ‘semi-washed’ and ‘fully-washed’ coffee, the first resulting from a processing carried out by the producer himself and the second from a processing carried out in a washing station, affect the export price. Thus, in 2010, ‘semi-washed’ coffee was sold at an average price of about US\$2.90/kg while ‘fully-washed’ coffee reached a price of about US\$4/kg. For the beginning of 2011, the trend is even stronger with ‘semi-washed’ coffee trading between US\$3–4/kg and ‘fully-washed’ coffee between US\$5–7/kg.

Thus, according to the president of COOPAC, the export price in 2011 was around US\$2.80 a pound for ‘fully-washed’ coffee, while the bonus awarded to the best coffees can get as high as about US\$0.60 a pound. According to the Coffee Cooperatives Federation, the rise of the export price is significant in 2011, with regular coffee trading at around US\$4/kg and ‘fully-washed’ coffee at about US\$7. In this context, the Federation encourages the exportation of ‘fully-washed’ coffee against the exportation of ‘semi-washed’ coffee.

The increase in prices since the beginning of 2009 has reached approximately 100 per cent and is partly a result of speculation, as stocks were reported that did not exist.

Market structure analysis

Domestic market

Local consumption of coffee is very limited and represents only 2–3 per cent of total sales of Coffee from Rwanda, which means less than 500 tons of coffee roasted and sold locally per year.

This low consumption is due to cultural and historical reasons. Coffee is not part of traditional beverage consumption in Rwanda, where people usually consume tea. Coffee consumption is associated with an image of luxury and is reserved for the wealthy class of the population. Coffee is indeed expensive when compared to the average income of Rwanda. It is estimated that the average food consumption per person is about US\$1 per day while a pound of roasted coffee retails for about 4,000 RWF or around US\$8.

This consumption, although still very limited, is on the rise. Increases in local consumption may be associated with the better adaptation of packaging. Many roasters have indeed moved from marketing 1kg packages to packages of 500g or 250g, which, given the cost of coffee as compared to the average daily income, is clearly an evolution more in line with potential demand.

Export markets

The main export markets for Coffee of Rwanda are Europe, which accounts for more than 50 per cent of those exports, the US, Japan and China. The principal European markets are the UK, Switzerland, France and Belgium.

These markets are not fully comparable. Europe and China import both 'fully-washed' and 'semi-washed' coffee, while the US and Japan import only superior quality 'fully-washed' coffee. In total, the 'gourmet' market represents 20–25 per cent of total exports of Coffee of Rwanda, the regular market 75–80 per cent, with the US accounting for about 50–60 per cent of exports of gourmet coffee and the European Union for virtually all exports of regular coffee.³⁴ Rwandan coffee exported at a 'semi-washed' stage is sold at an average price of approximately US \$2.90/kg and coffee exported at a 'fully-washed' stage is sold at an average price of about US\$4/kg.

However, prices show great fluctuations in the course of a single year. With the current trend rising, prices of 'semi-washed' coffee have increased in recent years from US\$2.40 to US\$3.40/kg and those of 'fully-washed' coffee from US\$3 to US\$4/kg. This upward trend has been constant in recent years on all export markets, with the exception of 2008, perhaps due to the context of the international financial crisis. OCIR-Café estimates that Rwanda suffers mainly from inadequate capacity and under-utilization of this capacity. Indeed, Rwanda produces only 20,000–25,000 tons of coffee³⁵ per year for a production capacity estimated at between 40,000 and 45,000 tons, which means that the rate of capacity utilization is only slightly higher than 50 per cent.

In any case, Rwanda's share in its main export markets is very low: Rwanda is a very small producer compared to market leaders Brazil, Colombia, Kenya and Tanzania.

The principal markets in which the Ministry of Agriculture expects the coffees of Rwanda to win market shares are those of Japan, the UK, Germany, the US and the Middle East, in which the reputation of coffees from Rwanda is already well-established. The Ministry of Trade also emphasizes the need to expand exports to the Indian market. For the Ministry, the main obstacle to the development of these exports is the low production capacity of Rwanda and not the quality of the coffee products, as the market today is capable of absorbing much larger quantities than those exported. Thus, all exported coffee is distributed without apparent difficulty and without an identifiable impact caused by price increases.

It should be noted that a big proportion of regular 'semi-washed' green coffee is exported to Kenya where it is blended with coffees from other countries, including Kenya itself, before being re-exported from the port of Mombasa. Thus, most of Rwanda's coffee exports do not reach their final destination directly but are exported in bulk to the port of Mombasa where they are mixed and re-exported by international companies, mainly American, Chinese or Arab, to their final destination, especially the UK or the US, where Starbucks is one of the main buyers. These coffees are then sold under a different brand depending on their final destination.

However, some coffees are directly exported to their final consumer market. This is the case of recognized quality coffees, such as Maraba coffee which is directly exported to the US or the UK after being roasted in Rwanda.

Private companies and cooperatives sell on these export markets either to industrial roasters or directly to large retail chains.³⁶

It should be noted that 'fully-washed' and 'semi-washed' coffees do not share the same customers in export markets. In the first case, customers are small roasters while in the second case, these are wholesale importers who re-sell their own product to industrial roasters.

Again, it should be noted that green coffee accounts for almost all coffee exports. Exportation of packaged roasted coffee to Europe and the US is not completely absent but there are very limited volumes. However, much of the added value of the final product comes from the roasting phase, which is conducted in Europe and the US. Under these circumstances, it seems natural to promote local roasting, but another problem must be overcome in order to implement this strategy: that of the referencing of producers or exporters of Rwandan coffee in large retail chains in Europe and the US. Many are those who believe that access to distribution channels in developed countries is very restrictive, if not completely closed. Under these conditions, exports must be made with the mediation of wholesaler importers or industrial roasters.

Note that in the past the coffee market has been regulated by a system of tariffs and quotas in the frame of the 'International Coffee Agreement' established under the auspices of the International Coffee Organization. This system is no longer active.

Value chain analysis

To date, coffee is purchased from the producer at an average price slightly higher than 200 RWF per kilo of cherries, the production cost of a kilo of cherries being estimated in the range of 80–100 RWF.

'Semi-washed' coffee, or parchment coffee, is sold at around 1,000 RWF/kg and green coffee ('fully-washed') at around 2,000 RWF/kg. The OCIR price known as 'promotional', in other words, the price of roasted coffee that is ready for consumption, now stands at approximately 4,000 RWF/kg and the retail price paid by final consumers in Rwanda is in a range of 5,000–6,000 RWF/kg.

In the case of COOPAC, the only cooperative present on the entire value chain, the price paid to producers is about 50 per cent of export prices, the latter being determined based on the market price of New York.

There are varying degrees of competition within the value chain. There is a problem regarding the allocation of land to one cultivation or another, but competition is the most vigorous mainly among exporters. The latter are 48 in number and comprise washing stations, hulling plants and representatives of foreign dealers. Five of these 48 exporters collectively represent more than 85 per cent of the total exports of coffee from Rwanda. They are all hulling plants.

As previously mentioned, the main source of added value in the coffee chain is the roasting phase, conducted mainly in importing countries. Hence, the president of COOPAC estimates that the average retail price of roasted coffee on export markets is about €10/kg, which represents a quadrupling of prices during this phase of roasting. In the US, the price of roasted coffee may even reach \$25/kg.

Advantages, disadvantages and potential problems linked to GI protection

Potential profit and benefits linked to geographical indication protection of coffees from Rwanda

Geographical indication protection of coffees of Rwanda appears to be necessary, according to the Federation of Coffee Cooperatives in Rwanda. For the Rwanda Development Board (RDB), GI protection could be accompanied by the implementation of planning works and a better product recognition, the designation acting as a guarantee, a form of free advertising, sending a strong signal to markets.

According to the Ministry of Commerce, the introduction of GI protection could also help develop export markets for coffees of Rwanda. The department would welcome the introduction of protection of geographical indication of coffees roasted and packaged in Rwanda.

For the RDB, the introduction of GI protection could lead to competition among producers and thus result in improved product quality and production processes.

Still, from the OCIR-Café point of view, small producers would find no advantage in the establishment of a protected geographical indication unless the cooperatives and private washing stations commit to grant them a return on the additional margins redeemed from such a GI protected status. The protection of geographical indication may be accompanied by an improvement in the quality of exported coffee and production processes used, provided that the geographical indication designation is accorded only to 'fully-washed' coffees.

The signal to the market could have a very significant impact, particularly for Japan, the US and the UK. The introduction of a geographical indication protection could also foster even better cooperation between producers than the already good relations, but this development can be envisaged only with the support of OCIR-Café.

According to the Ministry of Agriculture, the introduction of GI protection would force producers to make collective efforts to meet the standards imposed by the 'Coffee of Rwanda' label, and jointly defend the value of their name of origin.

Access to finance is a true problem in the area. Banks are considered to shy away from providing funding, because of risks of fluctuation in both production volumes and market prices. This difficulty in accessing finance is reinforced by the current experience, as certain washing stations, perhaps due to their own management weaknesses, found themselves highly in debt and unable to repay loans they had been granted.

The introduction of protection of geographical indications could give some perspective for higher prices and, consequently, facilitate access to finance for producers and washing stations by providing them better conditions of profitability. According to the RDB, however, even if introducing geographical indication protection may have an impact at this level, improving conditions for access to financing for producers will occur from further consolidation of producers into cooperatives, at least for those who do not yet belong to one. The Ministry of Agriculture confirms that membership in a cooperative is a prerequisite for access to funding sources.

For the Ministry of Agriculture, access to finance is an important issue for the entire agricultural sector not just for the coffee-growing industry, which is rather better off than others, as the specific industry actually receives 70 per cent of the total private agricultural financing allocated. The introduction of a geographical indication protection should lead to an increase in national income in general, and of each individual producer in particular. The relative trading guarantee ensured by a geographical indication could only facilitate access for small producers to sources of funding.

The possibility to get a premium price in relation with the image of quality brought about by the introduction of a GI protection seems quite realistic based on the experience of COOPAC, according to which coffees which already have established this image are trading at prices substantially higher than those on the market for other producers and cooperatives. Depending on the year, the respective prices of these coffees could range from US\$2.70 to \$3.50/kg for coffee from an unidentified cooperative, contrary to the range of \$4–4.50/kg for coffee from COOPAC. The bonus can reach even up to \$2/kg, says OCIR-Café, which is equivalent to about 70 per cent of the basic price. More generally, some washing stations have consistently higher prices than others due to their recognized production quality.

As previously mentioned, 'fair trade' labels have already been granted to some coffees of Rwanda, including the Maraba coffee, while 'organic' labels are now being developed. Currently, 12 to 15 cooperatives already have a 'fair trade' label while a sector is soon to be granted an 'organic' label.³⁷ Rwanda is favourable to the development of these labels, and introducing geographical indications protection seems absolutely consistent with this development, as the 'fair trade' and 'organic' labels may be granted to some producers, but not necessarily all, active in an area also protected in terms of geographical indication.

For the RDB, the combination of the labels might even result in higher added value. It should be noted that if the fair trade label is in principle favourable to small producers, as it ensures regular income, it may be detrimental in times of rising coffee prices. In fact, market prices can exceed the fair trade prices agreed and the bonus may turn into a malus, which is actually the case at present.

The introduction of a geographical indication protection could also boost the development of existing markets, or open new markets. Rwanda is already planning to significantly increase its coffee production and is targeting a production volume of approximately 40,000 tons within the next five years. Rwanda particularly hopes to develop its sales of 'fully-washed' coffee on the European market. It also hopes to benefit from increased exports to the US and China. In any event, even if the objectives of its development plan are achieved, Rwanda will remain a small producer and small exporter of coffee.³⁸ The department in charge of export promotion in the RDB is disposed to conduct market research on the impact of the introduction of geographical indication protection on major export markets for coffees of Rwanda.

Development of existing markets or access to new markets will, however, be restricted by the low capacity of the coffee-growing sector of Rwanda in terms of volume production, according to the Ministry of Agriculture.

Coffee-growing has already economically and socially transformed many parts of Rwanda, promoting the development of housing, education, infrastructure and health care as well as road infrastructure. Evidently, introducing geographical indications protection can only strengthen this trend.

However, introducing protection of geographical indication, which will lead to increase and growth of parcels, could possibly constitute a risk to the protection of ecosystems and landscapes and subsequently result in harm to biodiversity.³⁹ This concern is taken into account by the Ministry of Agriculture, and the risk could be reduced by introducing conditions for allocation of funding, so that respect to biodiversity will be taken into consideration in development projects.

Potential problems and disadvantages linked to GI protection of coffee of Rwanda

According to the Ministry of Agriculture, no problem or major disadvantage has been identified in connection with the possible introduction of protection of geographical indication for coffees of Rwanda. The Ministry notes here that exports represent more than 90 per cent of the total coffee production in Rwanda. The introduction of protection of geographical indications could be used to stimulate the initiative of producers and promote their collaboration in groups, with the support of the state. However, the risk of appropriation of the benefits by sector intermediaries to the expense of producers seems real and could also justify state intervention.

For the Ministry of Commerce, the development of a geographical indication could require significant resources in terms of expertise, and thus prove costly.

The study on the introduction of geographical indication protection of Rwanda coffees, as mentioned above, will address aspects related to the identification of their specific biological or cultural attributes. At this stage this does not seem to raise major difficulties, but conducting the study itself has nevertheless taken a long time, since it was launched five years ago.

Concerns regarding the complexity of developing a geographical indication from a legal and administrative point of view are probably valid, but the producers and their associations can count on the unwavering support of national institutions active in the sector, starting with OCIR-Café.

The RDB underlines that Law No. 31/2009 should be supplemented by an implementing decree or a ministerial order clarifying questions of quality and production processes. The development of a geographical indication certainly requires material and human resources, but these do not seem disproportionate in regard to the situation of many cooperatives. The RDB acknowledges that the situation is very different from one cooperative to another still, as some are facing significant management challenges.

Lack of not only financial, as already mentioned, but also human resources to engage in the process of developing a geographical indication may, in turn, prove to be a real obstacle in implementation of this project although, again, producers and their representatives can count on the support of national institutions in the sector.

According to OCIR-Café, precise geographical delineation of the area covered by the geographical indication could result in difficulties in implementing and managing a governance structure for the geographical indication. However, according to the RDB, national institutions such as OCIR-Café or ISAR could participate in the governance structure of a geographical indication in the coffee sector, and greatly facilitate its implementation and management.

Furthermore, OCIR-Café estimates that the smaller producers would undoubtedly benefit from the introduction of protection of geographical indication, provided that a rebate system is generalized so that the washing stations return at least part of the bonus yielded from the geographical indication. In this respect, the RDB notes that Law No. 31/2009 refers to the registration of a geographical indication on the condition that it can benefit small producers. The RDB also underlines that the state intervenes directly in setting the minimum price, which is widely disseminated through print and audio-visual means to the entire population.

Risk of marginalization of other important productions in the region should be reduced by the establishment of national programmes already in place to help maintain food production. Each district is well-delineated within the framework of a production zoning defined by the state. Without imposing a specific cultivation, this promotes the development of one or several cultivation(s) within a given sector. This recommendation is reflected as well in the easier access to financing, factors of production and seeds. In any event, such a case has not yet been observed to date, again greatly due to the practice of mixed farming.

The risk of excluding certain producers from the geographical indication cannot be ruled out, since the introduction of a geographical indication necessarily implies the use of standards some of which may not be able to respond to, or not wish to comply, as divergence in quality between products from neighbouring farms is a given fact.

To the contrary, possible exclusion from local demand does not seem to be a prospect of concern, at least not beyond a limited scale. Domestic consumption of coffee is, as previously mentioned, very low and belongs to a relatively wealthy class, since coffee is considered a luxury product.

For OCIR-Café, geographical indication should, at least initially, be owned by the state, even if subsequently it will be transferred back to the private sector. According to this organization, the question of ownership of the geographical indication should not be a source of conflict in any event.

If the site for the installation of a washing station is properly chosen, it is possible to limit the impact on the environment but it should not be overlooked that the activity of a washing station may have negative impact on its immediate surrounding environment. In fact, washing stations are in principle located on sloping grounds and use a large amount of water, causing runoff of wastewater into rivers or groundwater. Rivers surrounding the stations present high concentrations of sludge, containing large quantities of fermented saps.⁴⁰ The demucilaging operation, meanwhile, releases repulsive odours associated with the process of fermentation and growth of micro-organisms. In any case, it seems essential to monitor the impact of coffee processing

operations on the environment, and this aspect should be taken into consideration in a potential introduction of protection of geographical indication.

The introduction of GI protection, however, seems to not considerably affect local cultures.

Notes

- 1 The author is grateful to Mr Cheikh Alassane Fall for his contribution to the realization of this case study.
- 2 Approximately €65.
- 3 There is a legal possibility of cancelling a trademark, including on export markets, but this is a lengthy and costly process. Note that the collective marks, in turn, were first introduced by Law No. 31/2009 and no collective mark has been filed to date in Rwanda. The risk of legal conflict is therefore excluded in this respect.
- 4 These varieties were imported into Rwanda in the 1930s and 1940s and disseminated since 1961. Another variety, Mibirizi, residually present in Rwanda, was introduced into the country in 1910. This variety is endangered.
- 5 A dwarf variety from Kenya was in the past introduced in Rwanda but it never went into cultivation, as its roots are too short to allow the variety to resist the period of drought (July–August).
- 6 It should be noted that organizations OCIR-Café, OCIR-Thé and OCIR-Horticulture will be grouped under a single umbrella structure by the end of 2011, to be named NAED.
- 7 This research has found that Jackson is the variety most susceptible to rust, compared to the varieties of Bourbon Mayaguez.
- 8 The ISAR collection consists of 184 varieties of coffee. For each variety, ISAR keeps a varietal dossier describing the main characteristics, with the exception of the breeding scheme that led to the variety, which is considered secret.
- 9 A perennial crop is characterized by the production from the same plant for several years, contrary to annual crops which require annual replanting.
- 10 The meaning of associated cultivations is the interference that plants can have on one another, especially the shading one plant may offer the other.
- 11 This competence will be transferred to the Ministry of Agriculture once the restructuring process of the sector institutions is complete, as previously mentioned.
- 12 In fact, cherries are most often collected in a collection centre before being transferred to a washing station.
- 13 It should be noted that coffee cultivation in Kenya relies on an economic model that is very different from that of Rwanda, putting in stake big plantations and an advanced automatization.
- 14 However, according to ISAR, coffee production is reduced in the North, due to the presence of volcanic soils and to the very cold climate.
- 15 Acidity has a crucial impact on coffee tree productivity, as slightly acidic soils, with pH values ranging from 5.5 to 6.5, are the most suitable ones for the specific production. In the case of soil with insufficient acidity, it is possible to use lime to raise the acidity degree.
- 16 The same organizations are actually developing a designation of origin project for a coffee in Kenya. According to CIRAD, the perspective of developing a designation of origin for the Rwanda coffee is totally realistic and pertinent as the product is of high recognized quality. This subject has already been under consideration for many years. It should be noted that the *Institut de recherche pour le développement* (IRD, the French Institute of Research for Development) conducts a similar project in Ethiopia.
- 17 The ‘Cup of Excellence’ competition is organized by Alliance for Cup of Excellence, based in the United States. Until then the competition had only been organized in Latin America. Rwanda was the first country outside the American continent to organize this event.

- 18 Interestingly enough, ranking plays a decisive role, with the actual difference in the number of points obtained by each coffee quite often being minimal, by a few decimal points in a score exceeding 85/100 for the best 20.
- 19 However, most of the plots they operate do not exceed 0.1ha.
- 20 More than 36 million of which are productive, that is between three and 30 years old.
- 21 The high density of Rwanda, close to 400 people per sqkm, accounts for the difficulty in having farm surfaces of more than 50ha.
- 22 Currently there is a movement for the rationalization of cooperatives, as some of them face difficulties and are sometimes heavily indebted.
- 23 Belonging to a union is indispensable to gain membership in the national federation.
- 24 In terms of turnover, sixth in terms of volume.
- 25 It should be noted, in this regard, that the president of COOPAC is also president of the exporters' federation of Rwanda.
- 26 In contrast, COOPAC is not a member of the Federation of Cooperatives of Coffee from Rwanda whose contribution, of an amount equal to 5 per cent of the cooperative's turnover, is considered to be very expensive.
- 27 Coffee cherries are plunged into water and the damaged ones, which float, are then disposed of.
- 28 This is the case for a number of only 12 private companies.
- 29 The most important being Coffee Business Center, Rwacof, ENAS, Caferwa and RTC. All or almost all of them are foreign capital controlled companies.
- 30 Growers use manual pulping means most often made available in a community depulping centre. Then the coffee is left overnight in a slightly humid container. This makes fermentation shorter and washing takes place in the morning.
- 31 OCIR was a single organization until 1998 when it was divided in OCIR-Café and OCIR-Thé. Up to 2003, it was under the supervision of the Ministry of Agriculture, then, from 2003 to 2008, of the Ministry of Commerce, to come once again under the supervision of the Ministry of Agriculture in 2008. These changes in supervision meant that OCIR's missions had to evolve, with the Ministry of Agriculture giving priority to aid producers and support coffee production, and the Ministry of Commerce giving priority to missions related to the development of processing, washing stations and support to improving quality.
- 32 It should be noted that this minimum price is not determined on the basis of a fixed schedule but according to price developments in New York. However, in practice, it seems that it is reviewed at least at the beginning of the coffee season.
- 33 Coffee is also traded in New York in a futures exchange market.
- 34 Which, in certain cases, can be re-exported to the US. It should be noted that Rwanda exports almost exclusively coffee in the form of green coffee with roasted coffee exports being very marginal.
- 35 A production of about 400,000 bags of 60kg.
- 36 The COOPAC cooperative thus collaborates with a number of supermarket chains in France.
- 37 The project is under way and certification is expected by the end of 2011. The COOPAC also launched an initiative in this direction. 'Organic' production requires producers to replace mineral fertilizers and pesticides with organic fertilizers and bio-pesticides. According to the ISAR, production of organic coffee is characterized by lower productivity while the effect in terms of quality seems uncertain.
- 38 By comparison, Ethiopia produces about 350,000 tons of coffee per year and exports about 170,000 tons; Uganda produces about 150,000 tons which is almost all exported.
- 39 The risk is minimal, according to ISAR, in terms of impact of coffee crops on the ecosystem, particularly because of the practice of crop combination and dominance of small farms. There could, however, be much more considerable impact on landscape conservation and biodiversity. The use of pesticides that could affect pollinating insects could, in particular, present a significant risk to biodiversity.
- 40 Japanese-made equipment has recently been introduced in several washing stations to improve wastewater treatment.

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UGANDA: COTTON

Getachew Mengistie

Introduction

Uganda is a landlocked country in East Africa with a population of 31.7 million people and GDP per capita of US\$453 in 2009. It lies astride the equator and has a territory of 241,039km², of which 85 per cent is land and 15 per cent water. The country shares borders with five countries: Sudan in the north, Kenya in the east, the United Republic of Tanzania in the south, Rwanda in the southwest and the Democratic Republic of Congo in the west.

Agriculture is the most important sector of the economy contributing to the largest share of the gross domestic product, accounting for the bulk of export revenues, and providing employment opportunity to the majority of the population.¹ The government has a vision of transforming Ugandan society from a peasant to modern and prosperous country within 30 years. In pursuance of its realization of this vision, the government has issued a five year national development plan (NDP).² In addition to the NDP, there are sectoral policies which include National Industry, Trade and Science and Technology Policies.

Legal infrastructure for protecting geographical indications

Uganda has a law governing trademarks and a draft law for the protection of geographical indications. The 2010 Trademark Act provides for protection of trademarks and certification marks. Sections 4 and 9 of the trademark law provides with what constitutes a trademark and a registrable trademark. Section 4 states: 'A sign or combination of signs, capable of distinguishing goods or services of one undertaking from those of other undertakings shall be capable of constituting a trademark.' Section 9 enumerates signs that could be registered as trademarks. These include an invented word or invented words; a word or words having no direct reference to the character or quality of the goods or services, and not being according to its ordinary signification,

a geographical name or a surname, and any other distinctive mark or sign. It is worth noting that the phrase 'ordinary signification' may mean that a geographical name, which merely signifies a place, cannot be registered as a trademark. A geographical name may, however, be protected as a trademark if it imparts a message other than the name of a geographical location.

In addition to trademarks, the trademark law deals with certification marks, which may help to protect geographical origin of products and services. Section 13(1) provides that 'a mark adapted in relation to any goods to distinguish, in the course of trade, goods certified by a person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not certified shall be registrable as a certification mark in Part A or Part B of the register in respect of those goods in the name of that person as owner'. Section 13(6) further states: 'The fact that a mark consists of signs or indications which may serve, in trade, to designate the geographical origin of goods or services shall not preclude it from being registered as a certification trademark in Part A of the register in respect of those goods or services.' These provisions will enable to protect a sign or mark that may designate the geographical origin of a product or a name of a geographical location as a certification mark. Application for protection of a certification mark shall be accompanied by draft regulations governing the use of the mark, which shall include provisions as to the cases in which the owner is to certify goods or services and to authorize the use of the mark and may contain other provisions that the registrar may require or permit to be inserted including provisions conferring a right of appeal to the registrar against any refusal of the owner to certify goods or services or to authorize the use of the mark in accordance with the rules.³

Uganda has had a draft Geographical Indications Bill since 2008. The draft law aims to provide for the regulation and registration of geographical indications, duration of protection of geographical indications and remedies for infringement or prohibited use of geographical indications and for related purposes. The Bill defines a geographical indication as 'any indication, which identifies a good as originating in a particular country, region or locality where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin'.

Uganda is a party to a number of international and regional intellectual property agreements that may complement the national intellectual property legal framework, including the Lusaka agreement that established the African Regional Intellectual Property Organization (ARIPO), the ARIPO Banjul Protocol on trademarks, and the TRIPS Agreement. Membership of the ARIPO Banjul Protocol on trademarks provides the opportunity of filing a single trademark application with the Ugandan Registration Service Bureau (URSB) and securing trademark protection in designated countries that are members of ARIPO Banjul Protocol; namely Botswana, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zimbabwe.

The URSB is a government body, under the Ministry of Justice and Constitutional Affairs, which is responsible for administering IP laws. The office receives and processes applications related to patents, trademarks and industrial designs, grants patents, issues certificate of registration of industrial designs or trademarks and renews titles in

accordance with the requirements of relevant IP laws. The URSB also acts as a national focal point to receive regional and international industrial property applications and forward them to ARIPO and WIPO and receive reports made by these organizations.

Ugandan cotton

History and significance of cotton in Uganda

In Uganda, cotton was introduced in 1903 by the British Colonial government to serve as a cash crop and raw material for its textile industries.⁴ Uganda produces a cotton variety called Pedigree Bukalasa Pedigree Albar Cotton (BPA), which grows at an altitude of below 1,500m above sea level. BPA is a fibre of medium-long staple length with high spin ability. Cotton is produced in most parts of the country where the soils are more fertile, the climate is more humid and has less severe dry seasons.⁵

There are a number of features that make the cotton sector important in Uganda. These include the fact that cotton:

- Provides employment opportunity for quite a number of Ugandans. In 2000, there were approximately 300,000–400,000 producers (Gordon and Goodland 2000). This figure does not include those employed in ginning, spinning, garment and textile industries as well as those involved in the marketing and trading of cotton. The cotton sector has a huge potential of creating further employment opportunities in the country when considering the derivative products that may be extracted from cotton seed after separation of cotton lint such as edible oil, bio-fuel extracted and animal feed.

- Had been a major foreign exchange earner in the 1960s⁶ and has the potential of becoming a major export income earner again. This could be realized sooner than later as there is an increased demand and market opportunity for Ugandan cotton as well as suitable land that can be used for cultivation of cotton.

- Changes in the cotton sector may have linkage effect and positive impact on other sectors, including: agriculture, where cotton seed may be used for livestock and chicken feed; industry, where cotton yarn is used in the spinning, garment and textile industries; and energy, where bio-fuel may be extracted from cotton seed.

The government duly recognizes the importance of the cotton sector and has taken encouraging steps, including the establishment of a government body responsible for cotton development. The government is also keen to strengthen the competitiveness of the sector and increase trade revenue using branding and intellectual property tools. An assessment on the potential use of branding and intellectual property tools to strengthen the competitiveness of the cotton sector was made in August 2010 with the assistance of the World Intellectual Property Organization (WIPO).

Cotton production

Cotton is produced in many parts of Uganda. However, the major cotton growing regions are northern and eastern Uganda. Cotton is mainly produced by smallholders having an average 5–10 acres of land. Cotton production depends on rain and is affected during drought seasons. The average grower produces no more than 100kg of lint cotton per annum, which is equivalent to a gross income of about US\$70 (Baffes 2009: 1).

Uganda used to be one of the largest cotton producers in Africa until ‘the political and economic turmoil in the 1970s drastically reduced output, which fell from 78,000 tons in 1972 to 14,000 tons in 1976, reaching a record low of 2,000 tons in 1987’ (Baffes 2009: 1). Uganda produced a record output of 84,000 tons in 1969, making the country the third largest cotton producer in Africa after Egypt and Sudan (Baffes 2009: 3). A number of reforms have been taken by the government and investments made to increase the volume of production. However, an increased cotton production that was registered at one period could not be sustained. For example, in 2004/2005 cotton production reached about 47,000 tons but the volume decreased to about 28,000 tons in 2007/2008 (Baffes 2009: 6).

The reasons for the decline of cotton production include fluctuation of cotton price at the international market and low profitability of cotton compared to other crops. John Baffes explains that ‘during the 15-year period 1989/90–2003/04, nominal cotton prices received by farmers increased by an annual average of 3.1 per cent while the corresponding increases of the four food crops were much higher: 5.3 per cent for beans, 6.1 per cent for maize, 5.3 per cent for matoke, and 7.8 per cent for sorghum’ (Baffes 2009: 10).

The above problem can partly be addressed and the income of cotton growers can be secured by capturing the intangible values of the distinctive Ugandan cotton, promoting and marketing the product as unique at the international cotton market using branding and intellectual property tools. A rise in trade revenue and income of cotton growers will result in increased cotton production and provide with the opportunity of tapping the potential Uganda has in expanding cotton production. According to the Cotton Development Organization (CDO) Uganda has a potential of producing 1 million bales per annum with the right input and agronomy. This is four times the current production of cotton, which is 250,000 bales.

There are, however, challenges that may affect expansion of cotton production. These include:

- The fact that cotton is a labour-intensive crop;
- The low level of access to and use of modern agricultural equipment (land opening is made using hand hoes and there is low level of mechanization);
- Limited access to affordable credit;
- Low profitability of cotton compared with the return from competing products;
- High cost of production;
- Post-harvest contamination of cotton;
- Land fragmentation;

Lack of organized farmer groups and clusters that may facilitate production, service delivery and marketing;
 Dependence on rain and low use of inputs;
 High rate of seed wastage during planting;
 Inadequate cotton-targeted extension services; and
 Declining soil fertility, in particular in eastern Uganda.⁷

Cotton research and training

The Ugandan National Agricultural research organization has a cotton research programme that is carried out by the cotton research institute in Serere. The institute has made a number of impressive achievements including development and dissemination of new and improved cotton varieties. The institute had:

replaced two earlier varieties (BPA and Serne Albar Type Uganda Cotton (SATU));
 began updating and disseminating new varieties through an effective seed; and
 made available delinted⁸ and treated cotton seed that is currently used for planting (Baffes 2009: 14).

Cotton marketing and export

Cotton is currently produced and exported as basic raw material cotton lint. There is low capacity of value addition and use of cotton lint in Uganda. It is only 5 per cent of the cotton lint that is being used by local spinning, garment and textile industries. Despite the fact that the byproduct of cotton after separation of the lint, namely cotton seed, can be used for a number of multiple purposes such as extracting edible oil and making animal feed, little of this potential is exploited in the country.

Cotton is currently marketed in the local market and exported as basic raw material-cotton lint. The bulk of cotton lint, which is 95 per cent of the cotton production, is exported to African, Asian and European countries. The major import destinations are the Democratic Republic of Congo, Kenya, Rwanda, China, Japan, Singapore, Switzerland and the United Kingdom.

Cotton is one of the major exports of Uganda. In 2004/2005, for example, cotton was the fifth largest export commodity after fish, gold, coffee, and tea, accounting for US\$41 million (Baffes 2009: 14).

Uganda has a huge domestic, regional and international market opportunity for cotton and its byproducts. There is a potential of domestic fibre consumption of a quarter of a million bales. Uganda also has a big regional market. It is a member of regional trade arrangements, namely Common Market for Eastern and Southern Africa (COMESA), a region with a market of more than 400 million people in 19 countries⁹ and East African Economic Community (EAEC), comprising of Burundi, Kenya, Rwanda, Uganda and Tanzania, having a population of more than 125 million. The regional trading blocs provide a large market, and contribute in attracting foreign investment to Uganda and facilitate transport of goods.

In addition, there are preferential trading opportunities at the international level offered by major or potential major export destinations such as the United States,¹⁰ Europe,¹¹ and other countries that extend preferential trading arrangement under the GSP.¹²

According to the stakeholders in the cotton sector, Uganda does not have a problem of market. There is a demand for Ugandan cotton as a result of its distinctive qualities and characteristics such as spin ability and ginning outturn. There are, however, a number of challenges related to cotton marketing and export. These include:

Price fluctuations: low prices and lack of price stabilization schemes may discourage farmers from growing cotton;
Existence of competing crops such as beans, maize, cassava, finger millet, sorghum, sesame and soya beans that may fetch higher income to the farmers;
Subsidies offered by developed countries, which may impact cotton prices;
High cost of local borrowing; and
Increase in demand for wool, silk and synthetic fibre products.¹³

Relevant institutions in the cotton sector

There are three key institutions involved in the processing, supporting the production, promotion and quality control of cotton:

Uganda Ginners and Cotton Exporters Association (UGCEA);
Uganda National Cotton Farmers Federation (UNACOFF); and
Cotton Development Organization (CDO).

UGCEA was established in 1997. The association consists of all cotton ginners and aims to coordinate activities such as input financing, operating demonstration plots, and providing a forum for discussing issues affecting ginners and exporters (Baffes 2009: 7). UNACOFF is a non-governmental organization that is involved in improving cotton production, empowering cotton farmers and promoting the cause of cotton growers, particularly small cotton farmers. The organization aims to:

modernize and commercialize cotton production and value addition;
participate, lobby and advocate for farmer-friendly production, value addition, marketing, market information and pricing policies; and
recruit and develop a strong network for capacity building and cotton farmers and cotton farmers' organizations to increase the quantity and quality and value addition of their produce.

CDO is a government body established by law in 1994. The objectives of the CDO are to promote and monitor production and marketing of cotton and represent all aspects of the cotton industry in Uganda.¹⁴

The major functions of CDO include the following:

- registration of any person involved in cotton seed, seed cotton, lint cotton and operating ginnery;
- setting standards for seed cotton and lint against international standards;
- monitoring compliance of and providing advice on lint and seed cotton standards;
- grading and classification of lint;
- procuring, processing and supplying cotton seed for planting;
- collecting, maintaining and disseminating data;
- promoting establishment of associations of different players in the cotton sector;
- monitoring and providing advice on production inputs;
- setting and announcing, when appropriate, indicative farm gate, ginnery buying and export prices and to monitor prices actually paid at these levels together with prices of cotton seed for planting and milling;
- collecting, maintaining and disseminating statistical information in respect of all aspects of the cotton industry;
- providing advice to the government on policies issues related to the cotton sector; and
- inspecting ginneries to ensure compliance with registration requirements.

Distinctive features of Ugandan cotton

Uganda is known for producing some of the best cotton in the world. This is made possible as a result of excellent agronomic and climatic conditions as well as the skill of cotton growers. Stakeholders involved in the Ugandan cotton sector reported that Ugandan cotton has a high demand at the international market due to its unique characteristics.¹⁵

The Ugandan cotton has the following distinctive characteristics:

Cotton has fibre characteristics, which are in the premium range of any given parameter.¹⁶

Ugandan cotton matures earlier than cotton produced by other countries. In Sudan and Egypt, for example, cotton takes six months while it needs four and a half months to mature in Uganda. Early maturity of cotton enables early entry into the international market.

Ugandan cotton requires little cleaning.

The cotton lint and yarn appearance is bright white, which is demanded by and appeals to buyers on the international cotton market.

The yarn produced from Ugandan cotton lint is even, which makes spinning easier. Ugandan cotton lint is known for its smoothness and has been characterized as a lint that is 'as smooth as silk'.

The cotton is free from stickiness, caused by fluids of insects, which is common in cotton-producing countries in the world.

Cotton is 100 per cent handpicked and almost 100 per cent roller ginned, which enables it to preserve the quality and characteristics of fibre.¹⁷

Production of cotton is dominated by small-scale farmers with holdings of 1–5 acres, which facilitates and eases management of cotton.

The cotton sector is well organized and coordinated, involving key stakeholders. The sector is led by the CDO, which is mandated to regulate, promote and coordinate all aspects of the cotton subsector with the participation of the stakeholders.

There is an increase demand for Ugandan cotton at the international market including for the purpose of blending. Key stakeholders involved in the Ugandan cotton sector reported that Ugandan cotton is commonly used as a blend to add value to and market inferior cotton products of other countries without acknowledging the use of Ugandan cotton as an ingredient and its contribution in enhancing the quality of the blended product.

Despite the fact that Ugandan cotton has unique characteristics and demand, the return from cotton has been low on the international market. The cotton has been put on the international market as a commodity and has been fetching a commodity price set by buyers. Moreover, cotton price has been fluctuating and impacting cotton production in the country. The specific features of Ugandan cotton and the reputation and goodwill associated with it were not captured. Nothing was done to differentiate the Ugandan cotton from other countries' cotton products.

The potential use of GIs and trademarks in capturing the intangible values of Ugandan cotton

IPRs can be used to capture and further build the reputation and good will associated with and resulting from the distinctive qualities of Ugandan cotton. However, this requires addressing a number of key issues including the following:

Where does the competitive edge of Ugandan cotton lie?

What characteristics make Ugandan cotton unique compared to other countries and attract demand in the international cotton market?

What are the sources of the intrinsic value of Ugandan cotton?

What are the potential IP tools that may be used to capture the intangible values of Ugandan cotton?

What is involved in designing and implementing an IP business strategy?

Uganda's competitive edge rests with cotton lint, as there is no major export related to yarn, garment and textile products or cotton seed-derived products such as livestock and chicken feed, edible oil and bio-fuel. This is agreed by stakeholders. The fibre strength, smoothness, appearance and evenness of cotton lint makes Ugandan cotton lint distinctive compared with similar products of other countries. These qualities are well-known and recognized internationally. The distinctive qualities of Ugandan cotton lint are related to the excellent agronomic and climatic conditions as well as the skill of cotton growers in cotton-producing regions of Uganda. Intellectual property tools such as trademarks, collective trademarks, certification marks and

geographical indications may be used to protect the names of cotton-growing regions or signs including the names of places (which are referred to as 'brands' hereafter).

Geographical indications can be used to protect the names of cotton-growing regions such as the northwest Nile region as the distinctive qualities of the product are linked to natural factors such as soil fertility and climate of the cotton-growing places as well as cotton growers of the regions. Collective and certification marks may be used to protect signs and names of geographical locations and facilitate the use of the protected brand by a number of stake holders that are eligible to use the brand.

The choice of the relevant IP tool should be based on a number of considerations such as the type of brand to be protected and eligibility of protection; who will own and be eligible to use the intellectual property right (IPR), the IP regimes of Uganda as well as the countries where the brand needs to be protected.¹⁸ The brand, which may include the name of cotton-growing geographical locations, may be protected as a collective mark or certification mark or geographical indication if it is intended to be used by a number of persons that meets set requirements. In such a case the brand may be owned by a legal entity and the persons eligible to use the brand may be members of the legal entity or persons that fulfil set requirements. The type of IP marketing tool that may be used to protect the brand may depend on the brand itself and the legal regimes where the brand is sought to be protected. For example, a brand consisting of a name of a cotton-growing region may be protected as a geographical indication in countries where there is a separate regime dealing with geographical indication or as a certification or collective mark in countries that do not have a geographical indication protection scheme. It is worth noting that a brand may be protected using different IP tools in different jurisdictions.

The use of geographical indications, collective or certification marks will, among other things, help to:

- differentiate Ugandan cotton from cotton products of other countries;
- capture, protect and further build goodwill and reputation of Ugandan cotton emanating from its intrinsic value;
- impart a message of distinctiveness to consumers and develop their understanding of and association to the protected brand and Ugandan cotton products;
- create and retain customer loyalty, which is essential for success in business; and
- help to promote Ugandan cotton as a unique product, which will in turn result in new demands and enhance the value of the product.

There are a number of issues that need to be addressed in the protection, promotion and management of intellectual property rights related to Ugandan cotton. These include the following:

What should be taken into account in designing a brand? The designing of a brand, which is meant to appeal to consumers, should be simple, clear, easily memorable, culturally sensitive and take into account the peculiar features of the cotton-growing regions that resulted in the distinctive features of the cotton product as well as tap from existing reputation and goodwill;

Where the brand should be protected? Protection of a brand using relevant intellectual property tools involves cost including application and IP attorney or agents fees. There is thus need to determine the countries where Ugandan cotton should be protected. The choice of countries may be based on the following considerations: countries that are major import destinations or have the potential of being major importers of Ugandan cotton products; and countries that produce and export cotton.

Who should own the IPR over the brand? There are a number of stakeholders in the cotton sector. These include cotton producers, processors such as ginnery, garment and textile industry, exporters of cotton lint and relevant government bodies, such as CDO. Geographical indications are protected and owned in some countries such as the US by government departments and in Europe by producer associations. There is thus a need to decide who should own IPR over the brand related or involving name of a cotton growing region.

Who will be entitled to use protected IP? It is appropriate to determine the persons who are eligible to use a protected brand. The eligible persons may be limited to authorized cotton producers and exporters or institutions owned and controlled by the producers and exporters. It may also extend to authorize third parties that may be involved in the processing, distribution and marketing of Ugandan cotton or cotton-derived products. It is possible, for example, to authorize a garment or textile industry to market its product using the protected brand along with its own brand to impart the message of the source and quality of the raw material used to manufacture the industrial product

What will be the requirements for use of the brand? There is need to define the requirements for the use of a protected brand in marketing Ugandan cotton or derived products. Any eligible person must comply with set requirements. Failure to do so must result in cancellation of authorization.

What is involved in brand promotion and enforcement? Development of a brand and protecting it using relevant IP tool is not an end in itself. There is need to promote the brand, monitor the use of the brand, track down infringers and take enforcement action. This involves cost and requires brand promotion, management and enforcement capacity.

Should the brand be complemented by certification systems and fair trade labels? The brand may be complemented by organic certification systems and fair trade labels to take advantage of the growing organic and ethical market.

How will the cost of brand development, protection, management and enforcement be met? The development, protection, promotion and management of a brand will require financial resources. The initial funding may be obtained from the government and/or donor agencies. However, there must be a sustainable source of financing. This may be made possible by establishing a cotton brand management fund. Users of a protected brand may be asked to contribute a certain percentage of their income to the fund. The owner of the brand may be required to develop a transparent system in the use of the fund and regularly inform brand users.

Notes

- 1 Agriculture accounts for 53 per cent of GDP followed by the service and industry sectors, which contribute approximately 32 per cent and 10 per cent of the GDP respectively (Leesti and Pengelly 2007: 8).
- 2 The Republic of Uganda, National development Plan (2010/11–2014/15).
- 3 Section 14(2) of the Trademarks Act.
- 4 The British government was forced to promote cotton production in its colonies to keep running its textile industries as a result of disruption of cotton supplies from the US due to the American Civil War. (Crawford 1924: 141).
- 5 According to the Ugandan Cotton Development Organization (CDO), cotton grows in two thirds of the country. It grows in eastern, central, western and northern regions of Uganda. Most of the cotton production, however, is concentrated in the northern and eastern regions.
- 6 During this period, cotton contributed about 40 per cent of the export income of the country.
- 7 See www.cdouga.org.
- 8 Deliniting is a means of removing hairs on the cotton seed.
- 9 COMESA member countries are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.
- 10 Uganda is eligible to export garments and textile products to the US and Europe without duty and quota limitation under the African Growth Opportunity Act (AGOA).
- 11 Uganda is a beneficiary of the European 'Everything But Arms' (EBA) initiative.
- 12 Uganda is a beneficiary of non reciprocal trade offers by Canada, Japan and China under the generalized system of preferences (GSP).
- 13 The above constraints were identified by the stakeholders including exporters and CDO.
- 14 www.cdouga.org.
- 15 Ibid.
- 16 Regular High Volume Instrument (HVI) testing conducted in laboratories confirms that Ugandan cotton characteristics are all in the premium range for any given parameter.
- 17 Handpicking ensures the quality of cotton by avoiding or minimizing foreign matter. It is common knowledge that roller ginning is 'gentle' as compared to saw ginning. It helps to preserve the characteristics and integrity of the fibre.
- 18 This may include major Ugandan cotton export destinations and countries that grow cotton and compete with Uganda at the international cotton market.

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SENEGAL: YETT OF JOAL

Thierry Coulet¹

Introduction

Senegal is a member state of the African Intellectual Property Organization (OAPI). This organization is responsible for the registration and protection of GIs in its member states. OAPI has national liaison structures in its member states. The national liaison structure representing Senegal is the Senegalese Agency for Intellectual Property and Technology (ASPIT, *Agence Sénégalaise de la Propriété Intellectuelle et de la Technologie*), and responsibilities for the protection of GIs have recently been assigned to the Ministry of Industry. For Senegal, as for most member states of the OAPI, the legal framework for the protection of geographical indication is laid out in Annex VI of the Bangui Agreement establishing an African Organization of Intellectual Property. Annex VI, which focuses on geographical indications, has not been transposed into national law.

It should be noted that in the context of the implementation of its policy of promoting protection of geographical indications within its member states, the OAPI has recently initiated a pilot study aiming to identify eligible products for protection within four of its member states, namely Cameroon, Côte d'Ivoire, Guinea and Burkina Faso.

The Yett (*cymbium cymbium*)

The yett whose scientific name is *cymbium cymbium* is a marine mollusc, a genus of sea snail. Dried on the beaches by artisan fishers, it is used as a condiment in the preparation of certain dishes such as kandia soup or thiebou dieune. The cymbium feeds on seafood, and specifically the 'tchanda'. The cymbium adheres to the sand when the sea is rough; this behavioural pattern allows fishers to anticipate the volume of a catch by observing the weather conditions. The cymbium breeds mostly in December and January, but this period may extend up until March.

Fishermen distinguish several varieties of cymbium, among which are the rock or water cymbium.² This cymbium has the distinguishing trait of gorging itself with water, which it gradually loses during the ride back to the port. This variety is less popular among fishermen than others, such as the cymbium glans or cymbium pepo, a species that lives in the sand and remains the same in volume from catch to processing. The price of this variety is actually higher than that of the rock cymbium.

Geographical location of yett

Yett is found all along the coast of Senegal, and even beyond. Yett fishermen, including those operating in Joal, are known to frequent the coasts of Gambia, Mauritania, Sierra Leone, Liberia and Guinea. The yett is fairly homogeneous across the 'small coast' (from Dakar to Casamance). Joal and M'Bour are the two major mollusc fishing ports in the region. The mollusc originating in this region appears to have specific gustative qualities that consumers recognise. For some interviewees, it is the yett of Senegal, precisely, that differs from yett of other origins, as the yett caught on either the small or large coast are quite homogeneous. On the other hand, small-scale processors actually seem to be able to tell the difference of the yett originating from one region of Senegal to the other.

Informed consumers are also able to identify the origin of the yett by the colour of the product. As a result, the yett from Sangomar point and Pointe-Sarene appear to be particularly appreciated and recognized by consumers and small-scale processors.

The cymbium is also present in Asia, which explains the habit of consuming this shellfish in Asia and the relevant interest in importing the yett of Senegal.

Although the specific quality of Joal yett is recognized by its consumers, the natural or technical origin of this specificity is not clearly defined. One thought is that it owes its taste to the local plankton on which it feeds.

The industrial sector also underlines that there are local characteristics of the yett, particularly in terms of water loss.³ These differences in quality do not, however, translate into differences in taste.

The quality of yett also depends on how long it is stored on the boat before reaching harbour. This depends on how long it takes to collect all the nets, and therefore the number of nets⁴ has a crucial impact on quality. Improved quality of the final product could therefore be ensured by reducing the number of nets on board each boat, which in turn implies leading fishermen to shift from their traditional strategy of volume, to one of quality.

Fishing, processing and local expertise

Yett fishing is done using a special net with a large mesh⁵ but the yett is also a very common by-catch with other types of nets. It should be noted that the volumes of yett catches have been constantly falling for several years now. This reduction was observed after 1980. Previous to then, it was common for fishers to go out to sea twice a day, and haul in ten 60kg baskets of yett per day, per canoe; whereas, today

fishermen set out every other day. Fishing lines or a set of four nets attached to each other used to ensure a full boatload's catch, but fishermen now use 30–40 nets to catch no more than three or four crates, in other words well below the capacity of a boat's hold. According to all stakeholders, this reduction in catches reflects the depletion of stocks. Confronted with this situation, a fishermen's association is trying to promote responsible fishing practices and, in particular, a pause during periods of biological reproduction, but seems to not be receiving much attention. An experiment of this type was, however, conducted in January 2006 with the support of the Japanese International Cooperation Agency (JICA).

It seems, however, that the traditional quality aspects, mainly related to the duration of the drying period, are no longer respected, in a purely profit-making orientation towards the activity. This change of the production process is sometimes attributed to the arrival of the Asian industrial players in the late 1990s.

There are six main steps to production of processed yett once the shellfish has been captured: shelling, cleaning, salting, fermentation, drying and slicing. This process is identical in all yett fishing grounds. Once the shell is cracked open, the mollusc is buried under the sand for several days to season. It is then washed with clean water four or five times, sliced and dried in the sun. The quality of the finished product directly depends on the duration of drying, as it should be left to dry as long as possible, up to two or three weeks.⁶ Drying results in a change in colour of the product, which turns from whitish to a shade of red. Leaving the product out to dry in the open air is an essential phase in processing the yett. Sunshine is a natural characteristic essential to its production.

Yett fishing is an activity subject to a seasonal cycle linked to the period of yett reproduction (December–March). In principle, fishing is prohibited in Joal during this period. Nevertheless, fishermen still have the option to unload their catch in a nearby port.

It should be noted that the Management Committee of Small-Scale Fisheries of Senegal (COGEPa, *Comité de Gestion des Pêches Artisanales du Sénégal*) has included the yett among the list of species to be protected. Awareness-raising activities targeting fishermen have been implemented in this respect, as part of the cooperation initiative with Japan.

Geographical identification of the production zone

Two ports play a major role in fishing and processing the yett: Joal and M'Bour; Joal is clearly the most important of the two. These two ports combined account for about 70 per cent of Senegal's production of yett.

The fishing area where Joal fishermen daily cast their nets extends from Pointe-Sarène to Joal.

Several geographical designations could thus be considered: Joal yett, small-coast yett or Senegalese yett. In either case, the origin of catch remains to be certified, as it can sometimes be located very far from the port site.

Some interlocutors, however, indicate that the yett of Diffère or Fadiouth (a town of Joal) along with the yett of Sangomar are much more prized, and sold at prices higher than the yett from other fishing zones.

In general, it seems that yett processing in Differe and Fadiouth also follows the traditional processing technique.

Identifying key markets

About half the yett caught in Joal is intended for the domestic market, and the other half is sent off to various export markets. The main export markets of Joal⁷ yett are Korea, China, Japan, the Philippines, Hong Kong, Taiwan and Malaysia. The Elim Pêches company made an attempt to export cymbium to the American market, but requirements in terms of sanitary control imposed by local authorities were, according to Elim Pêches officials, too harsh for this market to prove profitable.⁸ It is worth noting that the yett is not directly exported from Senegal to Europe. However, according to several sources, yett exported to Asian markets could sometimes be re-exported to Europe, especially France, mainly to Senegalese expatriate communities.

Yett reputation in main export markets

According to Elim Pêches company officials, the quality of its product, especially the quality of the cymbium originating from Joal, is recognized by Asian consumers. When Elim Pêches had to cope with a lack of resources in Joal and resorted to sourcing cymbium from Mauritania, consumers noticed the substitution and sales declined. According to these officials, only cymbium from Senegal or from Gambia can remain in a good condition after boiler cooking.

Elim Pêches products appear to be extremely popular in Korea, and also have an excellent reputation in Japan.

Analysis of the competitive structure

Value chain analysis

Two streams should be clearly distinguished as regards to the processing and distribution of the yett: the first is the local one, which features artisanal processing of the product destined for the domestic market. The second is the industrial one, which performs a double cooking and freezing process on the natural product and is intended exclusively for export.

A census of stakeholders involved in the yett fishing and processing industry was recently undertaken, commissioned by the Ministry of Fisheries.

Fishers

The census shows that there were about 700 boats engaged in fishing in Joal in April 2010. A percentage of 99 per cent of these boats belong to the fishermen themselves, and a few others belong to a fish wholesale trader or a private investor.⁹ In their majority, fishermen only own one canoe, although some may have two or even three. Management of the activity does remain, in any event, based on a family model.

The number of cymbium fishermen in Joal has rapidly grown in recent decades. In 1960, not more than a dozen cymbium fishermen were operating in Joal.

It should be borne in mind that the canoes come in very different sizes, capable of carrying four to 35 hired fishermen. Small canoes, with fixed nets, gill nets or encircling gill nets, set out fishing daily, leaving the port each morning to return late in the day.¹⁰ Large boats, on the other hand, can remain at sea for much longer periods, reaching up to 20 days.¹¹ These large boats can sometimes operate in pairs, with one boat handling a net like a purse seine, and the auxiliary carrier boat being responsible for retrieving the catch.¹²

Within the fishing community itself, it is necessary to distinguish several groups according to the fishing technique implemented: fishing using fixed nets, towed gear, cast nets and, finally, recovery of waste from trawlers. As cymbium constitutes a by-catch of the latter, some fishermen actually specialize in the recovery of their releases. This practice is, however, prohibited in Joal. An estimated 90 per cent of the total proportion of fishermen are using some type of net.

In 2000, the total catch of cymbium represented a volume of 4,916 tons for the whole of Senegal. In 2009, the catch amounted to a volume of 1,760 tons for the single port of Joal. These volumes are marked by strong seasonality, the months presenting lowest volumes being October (21 tons) and December (1 ton), in contrast to the most productive months of May (280 tons) and August (291 tons).

In Joal, a daily-catch boat would normally produce four or five crates per day in the month of June, each crate holding some 55–60kg of yett.

It should be noted that few Joal fishermen specialize in yett fishing. Most of them engage in other fisheries in parallel, and use a specific net for each case.

No stakeholder can be considered dominant in the fishing industry itself.

Other actors involved in the chain include: fish wholesalers, national distributors and exporters, small-scale artisanal processors, processing plants destined for export operations.

Small-scale artisanal processors

There is only a small number of processors, who are further reducing sharply in numbers in recent years, due to scarcity of the resource.¹³ Most of them have one or two employees.

Traditionally, processors pay the fishermen in advance, to buy exclusive access to the product caught. Usually processors do not work only in yett processing but also operate with other fish products (kettiah, etc.); nevertheless, yett constitutes their main product. These processors are sometimes actually the yett fishermen's wives, and in this case a part of the catch is usually reserved for them, and the other part is sold to wholesalers who supply the domestic market.

Wholesale traders

There are eight yett specializing wholesalers trading in Joal. All of them work exclusively with specific fishermen whom they pay in advance, while they themselves

are pre-financed by a factory.¹⁴ These are the plants that fix the purchase price of the resource. Factories actually have economic power over the entire industry; furthermore, they pre-agree their purchase price, which of course considerably increases their economic power on the fishermen and fish wholesale traders. The only effective competition that these plants could face would be from the processors, but this competition is clearly unbalanced.

Factories and industrial processing plants

The sector has four cooking and freezing plants and some 30 private facilities implementing the same type of operation on a smaller scale. These facilities have emerged more recently than the factories, and this emergence seems to result directly from the success of the product on the export markets.¹⁵

Factories are working directly for an exporter or, in some cases, belong to one of them. This is the case of the Elim Pêches plant, the only factory located in Joal, and top exporter of the Senegalese yett. Elim Pêches collects yett all along the small coast of Senegal,¹⁶ not only Joal. The company pre-finances five to six wholesalers over the period of a year.

Elim Pêches employs 20 permanent employees and about 50 other fixed-term employees. The company appears to be in a clearly dominant position, since the other three plants, located in Dakar, employ fewer than five people each.

The company was founded in 2004 as a partnership between Korean and Senegalese entrepreneurs. Elim Pêches does not process cymbium exclusively, but is also operating other types of gastropods, including mirex. The initiative was triggered by the emerging interest from the Asian market for boiler-cooked¹⁷ cymbium, dating from the beginning of 2000.

Elim Pêches, like other industrial processing factories and facilities, processes the product using a cook-and-freeze technique. The production process implemented unfolds in a series of steps which are:

- Receipt (weighing);
- Washing-sorting;
- Cooking;
- Cooling;
- Trimming;
- Washing;
- Calibration;
- Weighing;
- Shelving;
- Freezing;
- Extracting;
- Conditioning;
- Storage;
- Labelling; and
- Shipping.

The main technical characteristics of the process are cooking temperature, pressure and duration. These characteristics are considered to be an Elim Pêches trade secret but have not been patented.

Elim Pêches has three competitors in Dakar.¹⁸ These companies are all operating on the same upstream and downstream markets, and are all implementing a similar process, although the specifications mentioned above are individual to each entity. These specificities are reflected in the different characteristics and gustative qualities, which are apparently recognizable.

The entire Elim Pêches production is exported, mainly to Korean markets, which account for 62 per cent of the company's sales. The other export markets are Japan (22 per cent) and China (5 per cent).¹⁹

However, production has sharply fallen at the plant level, especially for Elim Pêches, due to scarcity of the resource. This decline has been particularly felt since January 2009.

Elim Pêches sells to importers on the various export markets, who in turn resell the product to individual traders and supermarket chains.

Elim Pêches is clearly in a dominant position in the 'cook-freeze' industrial activity, with its sales representing approximately 70 per cent of total industry sales.

It is worth stressing that Elim Pêches has already identified imitations of its products in China. Elim Pêches is therefore absolutely convinced that establishment of geographical indication protection of the Senegal yett is important, and fully supports the prospect.

Sector organizations

In Joal, most yett fishermen have formed economic interest groups (EIGs), in turn divided into various local unions at the village and inter-village level, and assembled themselves into a national federation, the FENALGIE.

The organization of fishermen in EIGs responds to a government incentive to do so. This form of organization facilitates the access of fishermen to finance.²⁰

There is also an association of Joal fishermen that includes all the fishermen, whether they are in the yett fishing business which they are, in the majority, or not.

Also to be noted, is an association of fishermen called 'Oceanium', which promotes measures to protect the resource by promoting the release of young cymbium caught, along with the respect of biological rest periods.

Furthermore, there are national organizations of wholesalers and processors.

There are five major national organizations related to yett fishing and processing: the National Collective of Fishermen of Senegal, the National Federation of Fisheries EIGs of Senegal (FENALGIE), the National Federation of Fish Wholesale Traders of Senegal, the National Federation of Fish Processors and Wholesale Traders of Senegal and, finally, the National Union of EIGs of Fish Wholesalers of Senegal.

These five associations have grouped themselves into a single entity called the National Interprofessional Committee of Artisanal Fisheries of Senegal (CONIPAS, *Comité National Interprofessionnel de la Pêche Artisanale du Sénégal*).

Also worth noting is the existence of the Management Committee of Fishing Piers of Joal, based in Joal, which manages the docks and includes all stakeholders in the

sector: fishermen, processors, wholesalers, administrative services and municipalities. This committee is the interlocutor of the EU Delegation in the implementation of the Joal port authorization, for import into Europe of products that are landed in Joal port.

The Joal Fisheries Committee is in charge of day-to-day management of the fishing pier and boat registration.²¹ The committee constitutes an inter-professional economic interest group financed by collecting a fee from its members. The committee manages the fishing pier in Joal, with a concession on behalf of the Municipality of Joal, which itself holds the main concession.²²

Eleven organizations are members of the inter-professional EIG, representing from fishermen, fish wholesale traders and processors, to the unloading and handling personnel and the three fishermen's organizations: FENALGIE Fisheries, which is a national organization; the National Collective of Fishermen of Senegal (CNPS, *Collectif National des Pêcheurs du Sénégal*); and the Collective of Young Fishermen. It appears that these organizations do not know the exact number of their own members, some members may belong to several organizations. Such is for instance the case of CNPS, whose President also chairs the interprofessional EIG.

Analysis of the market structure

As previously elaborated, yett processing operations are divided into two very distinct processes: the artisanal process, intended solely for the domestic market; and industrial processing, intended exclusively for export markets.

Domestic markets

Although prices are quite volatile, nonetheless it seems that they are all increasing. The typical price of a 60kg basket of cymbium in 2008 was about 2,500 XOF. In 2011, crates of cymbium, which have replaced the baskets but hold the same volume and have the same weight, are sold at 40,000–50,000 XOF, about 650–830 XOF/kg. This price increase is mainly attributed to the scarcity of the resource.

The average product price paid by the consumer on the domestic market varies from 700 to 1,500 XOF/kg depending on the quality of the finished product. Quality differences are indeed recognized and considered important.

The yett constitutes a type of condiment used as an ingredient in the preparation of certain dishes; its consumption is linked to a certain consumer 'comfort' and in no case can it be considered a staple food. In addition, seasoning products do exist in substitution of this condiment, such as guedj or artificial flavours (Maggi, Knorr broth, etc.). It is therefore valid to consider that domestic consumption is highly dependent on its price and the price elasticity of this product in the domestic market is high.

Export markets

The production of the cook-freeze industrial sector is exclusively intended for export markets, mainly Asia and, more specifically, Korea, Japan and China. Chinese and

Korean companies have been established in Senegal to exploit this sector. In the town of Joal, a processing industry called Elim Pêches was bought by a Korean company in 2004.

Yett production for export, which passes through the processing plants, represents a volume of 4–5 tons per day for the single port of Joal. It should be noted that Elim Pêches is the top exporter of Senegal in terms of cargo volumes (about 3,600 tons per year).

There is no international spot market or futures market for this type of product. The yett is the object of direct negotiations, firstly between fishermen and fish wholesalers, and then between wholesalers and processors on the one hand, and the processing plant on the other.

GI protection of the product on its main export markets

So far, the product has no protection of its geographical indication in Senegal or any of its export markets.

Main distributors of the product on its main export markets

Elim Pêches negotiates with four importers for the Korean market. Prices are set with each importer for the entire year. There has been an upward trend in prices since late 2007.

Substitute products on export markets

Cymbium as such is a dish in Asian countries, and therefore there is no competitor that could directly substitute the yett.

Value chain and competition features

The value chain is strongly characterized by pre-financing practices, from downstream to upstream, at each level of the chain.

Analysis of the value chain

Prices charged by producers are homogeneous in a given period. However, there is a strong variation of the price from one day to another. Also, these prices have presented a remarkable upward trend since the port of Joal was awarded a licence for export to the EU. In this context, the Joal Fisheries Department is responsible for issuing certificates of origin and health to wholesalers; implementation of this certification has resulted in establishing a traceability system for these products, now tracked from capture to sale.

The purchase price of the product from fishermen has risen from 6,000 to 35,000 XOF per case in a few years, while the selling price of the processed product to merchants who sell on local markets in 2010 varied between 700 and 1,100 XOF/kg.

Many processors who provide advance payments to fishermen are themselves pre-financed by traders.²³ These appear to be in an advantageous position since, according to our interlocutors, local demand would exceed supply.

Prices charged by wholesale traders take into account both the selection process to sort out the resource and the physiological characteristics, in particular the stability or instability of weight. This is a particularly important feature as cymbium can lose up to 30% of its weight during its trip from Joal to Dakar.

When there is no such type of direct agreement, the fisherman sells his catch either to an intermediary or to a wholesale trader, for a price of around 200 XOF/kg either way. The intermediary, called the 'lagalagal', then sells the product to a fish wholesale trader or, occasionally, directly to a processing unit at a price of around 225 XOF/kg. It should be noted that the fish wholesale trader can also occasionally pre-finance the fisherman. The wholesalers then sell their product to the processing plant, occasionally to small-scale processors. When sold to factories, the product is sorted by the fish wholesale trader and meets certain pre-set standards. Its price can then reach up to 700 XOF/kg.²⁴

It should be noted that sales are most often based on estimates, without weighing the product, resulting in fairly common sales losses for fishermen. However, fishermen are not obliged to sell their catch in Joal and can travel along the coast to negotiate the catch at various ports.²⁵

No price is fixed at any stage of the industry whatsoever. Prices may vary at very short notice, sometimes slightly, other times considerably, depending on production volumes and demand. However, the following prices have been quoted as representative 'standard' prices at the time of this study (December 2010):

- landing price: 500 XOF/kg (ranging from 450 to 700 XOF)
- entry prices at the factory: 560 XOF/kg (ranging from 500 to 700 XOF)

The management cost of a net for a fisherman is estimated at 10,000 XOF, but he can earn up to 50,000 XOF by selling a crate. Yett fishing is therefore a very lucrative activity. This profitability has led fishermen to recognize the value of a pause during the period of biological reproduction, but this practice, as seen above, is not yet generalized.

Elim Pêches quotes a resource purchase price of 600 XOF/kg, with this price on an upward trend since late 2008 because of the scarcity of the resource.

It should be noted that the yield of the finished product ready for consumption is about 50 per cent of the gross landed weight.

Transportation is also an important element in this value chain. The cost of transportation is deducted from the 'ex works' value of the product, i.e. the price paid to producers, so the producer's income decreases in proportion to the distance from the centre of consumption for which the goods are destined. The main national consumption centres are Dakar, the other large urban centres and the Casamance region.

Competition at different levels of the value chain

Yett fishermen are numerous in Joal, as is the case throughout the small coast. However, as all their catch is easily sold, there is little competition. The absence of

price competition also results from the practice of pre-funding of fishermen by processors and wholesalers.²⁶

Competition between wholesalers appears to be the stiffest, and it much explains their willingness to enter into pre-financing contracts with fishermen to ensure exclusivity on the product of their catches.

The plant located in Joal, Elim Pêches, is itself in competition with three other factories located in Dakar. Competition among these entities is considered rude, although Elim Pêches is indicated to be in a dominant position.

Vertical integration in the value chain

There are two cases of vertical integration in the port of Joal between the activities of fishing, fish trading and processing. However, neither of these two players²⁷ is involved in yett fishing or processing.

Two other actors have attempted an integration of fisheries and the fish trade, but these attempts were unsuccessful. It seems that the fishermen are, by definition, too mobile to engage in activities other than their own core activity.

There is no other case of vertical integration in the value chain.

Vertical cooperation in the value chain

As stated previously, the cooperation between fishermen and fish traders on the one hand, between fishermen and processors on the other, and finally between wholesalers and factories, is very common in the port of Joal in the form of pre-financing agreements.

Factories in Dakar have their own representatives on the port site, the conveyors, but they do not deal directly with fishermen.

According to some of our interlocutors, small-scale processors would be expected to disappear from the yett value chain, victims of a foreclosure effect due to the fact that industrial plants²⁸ offer fishermen higher prices for their product. These processors remain, however, active in the production chain of many other products, such as the guedj.

The inter-professional EIG Diamo, managing the Joal fishing pier, constitutes another form of cooperation within the value chain.

Advantages, disadvantages and potential problems linked to GI protection

Profit and potential benefits linked to geographical indication protection

Stakeholders consulted most often recognize the substantial potential benefit in establishing geographical indication protection for the yett. The main potential benefits identified linked to a possible GI protection concern the potential impact of

labelling on development of infrastructure, stabilization, quantity and quality of production and, consequently, hopefully easier access for new funding. Funding is indeed a serious problem for the sector, as private and public institutions most often refuse to provide even limited support to further develop, or even to just maintain this activity.

Other expected benefits from protection of geographical indication include the opportunity to increase the selling price of the product, building awareness of the product in export markets, and stricter selection processes at the source, thus resulting in improved quality.

For small-scale processors, labelling could open new markets and assist them to develop their business towards export markets.

According to Elim Pêches, protection of the yett's geographical indication could have a positive effect in improving production processes and final product quality. This protection could also be an important message to markets. However, the company possesses foreign capital, and faces no problem of funding, the introduction of protection of GIs would probably bring them no benefit in this sense.

The impact of GI protection on sales volumes in key export markets could be significant, according to Elim Pêches company officials, from a 50 per cent increase to a doubling of exports.

Potential problems and disadvantages linked to GI protection

Among the identified potential disadvantages of possible geographical indication protection for the yett, worth noting is the risk of exclusion of fishermen registered at secondary ports.²⁹ Fishing yett is indeed very intense beyond these two ports.³⁰ This reality should at least be duly taken into account in defining the area covered by the protection.

Another risk identified is that new investments will be required to qualify for certification for protection of geographical indication. Given the financing difficulties mentioned above, this could lead many players to exclusion from the system.

Industrialists, meanwhile, evoke the risk of seeing new health checks on the product being introduced, such as the microbiological controls that US authorities demanded for each lot exported to the United States. This type of control is an unjustified administrative burden according to officials of Elim Pêches. However, introduction of such an obligation for the purposes of GI protection is considered to be unlikely.

Elim Pêches officials also stress that the introduction of such protection would indeed probably lead to exclusion from the supply side. However, this is considered to be positive, as it would actually eradicate lower quality products from the market, which are currently tarnishing the reputation of the product.

The fact that the resource is already becoming scarce means that there is an actual risk in terms of biodiversity. This should be specifically addressed and managed in any future system put in place to protect the yett's geographical indication.

Implementation of GI protection will inherently boost export market development, and would also by nature favour factories against small-scale production. It could hence constitute a serious threat to the preservation of local culture and traditions.

Other possible tools of GIs protection and their respective advantages and disadvantages

It is also worth noting that the two ports of Joal and M'Bour are the only two in Senegal to have been approved by the European Union, allowing products reaching these ports to be sold onto the European market. A certification system on the landing location is being put in place following the relevant approval.³¹ This system can be considered a form of protection of geographical indication of the landing site (but not the fishing site) for the European market.

In Joal, the Fisheries Department will be responsible for issuing certificates of origin and health to wholesalers, which will include the registration number of the canoe. The implementation of this certification is thus accompanied by the establishment of a system of traceability from product capture to sale. The wholesalers must declare the nature and volume of their purchases to the Fisheries Department before they can in turn sell their products to processing plants in Joal or Dakar. This certificate is also required for the transport of cymbium to Dakar.

In 2011, all boats must be registered and an electronic positioning system will be put into place to ensure full traceability of the product, from the capture zone until it is sold to the consumer.

It is also worth noting that the departmental inspection of M'Bour launched a cymbium certification project in June 2010, and has already organized its kick-off meeting.

Inter-professional EIG Diamo is willing to work with the fisheries administrations in implementation of geographical indication protection of the yett.

Elim Pêches declared that they have filed a complaint to the Directorate of Industrial Processing of Fishery Products of the Ministry of Fisheries against small-scale producers selling products labelled 'Origin of Senegal', for unfair competition. According to the company officials, these processors are aiming to confuse their products with those of Elim Pêches in the minds of consumers.

Despite the risk of know-how theft, it seems that Elim Pêches has never considered filing a patent for their yett processing technique. No 'organic' type label has ever been mentioned until now.

Notes

- 1 The author is grateful to Cheikh Alassane Fall for his contribution to the realization of this case study.
- 2 Also called Yett youroumba.
- 3 As a result, according to the Head of Quality at Elim Pêches, the rate of loss of cymbium originating from Rufisque is 13 per cent against only 8 per cent for cymbium originating from Joal, Difere or M'Bour.
- 4 A single boat can use up to 20 nets.
- 5 Traditional nets, called '100 cotton mesh', are being replaced at a growing pace by monofilament gill-nets (nylon), also sized 100.
- 6 48 hours is considered the minimum.
- 7 Of the Elim Pêches company, in the majority
- 8 American authorities required microbiological tests to be systematically administered by the Institute Pasteur of Dakar.

- 9 It is worth noting that the factories themselves do not own boats. Elim Pêches used to own two boats, but has now re-sold them.
- 10 A fixed-net boat typically has four crew members, whereas a gill net or encircling net boat would usually employ eight.
- 11 This is the case of so-called 'pirogues glacières', that is, pirogues equipped with ice boxes, which usually employ a crew of 8–15. Certain boats, called 'tide boats', can also set out to sea for a period of 20 days, but for these producers the yett constitutes a secondary product, and therefore these boats usually do not bring in more than five crates of product.
- 12 A carrier boat usually has a seven-member crew.
- 13 And not, as per the argument of artisanal processors, due to the intervention of factories.
- 14 This system of chain pre-financing is a type of employee relationship, without the constraints of the relationship for the pre-financing party.
- 15 According to an Elim Pêches representative, the quality of the product marketed by these workshops is sometimes much lower and may result in tarnishing the commercial image of Senegalese yett.
- 16 From Rufisque in the north to Differe in the south.
- 17 Whereas in Senegal, yett is traditionally left to dry in the sun.
- 18 It is worth noting that there are other boiler-cooking facilities for cymbium processing located in Mauritania.
- 19 There are no exports towards the European Union, but it seems that a portion of the product exported to China is then re-exported to the EU. A study has been launched by Elim Pêches to assess feasibility and benefits of exporting the product directly towards Europe, where the yett would appear to be received with caution as regards to toxicity aspects.
- 20 In the 1990s, the government led the formation of cooperatives, but this action had mixed success. It should also be noted that there is a project led by the Ministry of Fisheries for financing the sector, which is considered to be responsible for the installation of the fishing dock and processing site in Joal.
- 21 In coordination with the fisheries checkpoint operated by the Ministry of Fisheries.
- 22 This pier was constructed by EU funds.
- 23 An example of a Joal processor was quoted, whose activity is pre-financed by a merchant in Dakar to the amount of 2 million XOF per month.
- 24 Whereas the price would not exceed 225 XOF/kg in the 1990s.
- 25 An unwritten community rule, moreover, dictates that a portion of the catch landed in Joal should be offered by the fisherman for free to the members of his family; this also encourages them to visit other ports following their fishing trips.
- 26 It should be noted, however, that there is stiff competition between processors and wholesalers in concluding such pre-financing contracts.
- 27 One of which owns seven boats.
- 28 This observation is relative, however. In fact, the exact opposite has been observed during the week preceding the realization of this mission, with higher prices paid by processors compared to those offered by factories.
- 29 Apart from Joal and M'Bour.
- 30 From 400 to 500 boats may be affected.
- 31 Process launched in 2009.

SOUTH AFRICA: ROOIBOS TEA

Sophie Réviron with the collaboration of Nadja El Benni

Rooibos tea is competing on the world tea market with green teas as well as with herbal teas and benefits from the favourable trend for these products in developed countries. The following section presents the evolution of the tea world market and is followed by the presentation of the case study.

The world and Rooibos tea market

Tea is grown in 36 tropical and semi-tropical countries. The seven largest producing countries, China, India, Kenya, Sri Lanka, Turkey, Indonesia and Vietnam, accounted for 86 per cent of world production in 2006 (see Table 17.1). The world main exporters are Sri Lanka, China, Kenya, India and Vietnam, accounting for 77 per cent of total world exports. The main importers of tea are the EC15, Russia, the UK, Pakistan and the US, importing 56 per cent of total world imports (FAO 2008).

There are two major types of tea, black and green. Black tea accounts for around 75 per cent of global production and more than 90 per cent of the market in Western countries. Black tea results from leaves that are fully oxidized, while green tea leaves are steamed, rolled and dried without any oxidation. Most green tea is grown in China and is gaining popularity in the West, partly for health reasons (Agritrade 2008). Between 1996 and 2006, green tea production increased by 4.7 per cent per year and exports by 14.1 per cent per year. The export growth rate for black tea was 1.5 per cent per year between 1996 and 2006 (FAO 2008). The biggest tea producer is China with a share of 32.8 per cent of the world's tea production, followed by India with 20.7 per cent. The biggest export countries are Kenya, Sri Lanka and India with between 16 and 21 per cent of the world's exports (FAO 2011).

In general, tea is sold through auctions or in private deals, increasingly online. Unlike coffee or cacao, there is no futures market for tea. Several tea auctions can be found in India (Calcutta, Guwahati, Cochin, Coonoor) and Africa (Kenya, Uganda,

TABLE 17.1 World tea (black and green) production and exports 2008

	<i>Production (000 t)</i>	<i>Production (% of world production)</i>	<i>Exports (000 t)</i>	<i>Exports (% of world exports)</i>
China	1275.4	32.8	299.8	15.8
India	805.2	20.7	203.2	10.7
Kenya	345.8	8.9	396.6	20.9
Sri Lanka	318.7	8.2	318.3	16.8
Turkey	198.1	5.1	k.A.	k.A.
Indonesia	150.9	3.9	96.2	5.1
Vietnam	173.5	4.5	104.7	5.5

Source: FAO 2011

Tanzania, Malawi). Indonesia has also a tea auction and Dubai is building up the Dubai Tea Trading Centre (DTTC), which is expected to be in high competition with Kenya's tea auction in Mombasa (teauction.com). Online tea auctions bids can be submitted at any time and the sale process is not geographically confined. Transaction cycle times and the stages in handling are reduced. Also teas need not be transported to warehouses as inspections can be done using samples couriered to buyers from the plantations. Although the auction system seems to approximate a fair market in which prices are determined solely by the interplay of supply and demand, the system does not always work well for small-scale producers. Auction prices vary considerably with both the quality and quantity of tea on offer, and the demand for tea at any given time. Another problem is the evidence of collusion among brokers to influence prices. Such collusions would tend to reduce the price at which producers could sell tea at the auctions, and would also affect process on direct sales. In 2005, the situation was deemed so bad that the Kenyan National Chamber of Commerce called for the elimination of tea auctions (FAO 2008).

As tea is traded on auctions there is no single world price for tea, but rather prices differ with auctions. Figure 17.1 shows the average prices of three tea auctions (the Mombasa, Colombo and Kokata auctions) in US\$ per kilogram of tea. Between 1970 and 2000, World Bank figures suggest that tea prices fell by 44 per cent in real terms. However, due to droughts in Sri Lanka and Kenya and an increase in demand, tea prices more than doubled between 2002 and 2009 (Agritrade 2010).

The tea industry is highly concentrated. Big tea companies are present at almost all processing stages from the bush to tea bag or packet. These companies buy tea at an early stage of production, and usually carry out the high-value-added blending and packaging (which account for 80 per cent of the retail price), at facilities in the EU and other Western countries.

Green tea and herbal tea are the closest substitutes to Rooibos tea (Biénabe and Leclercq 2007). As well as green tea, Rooibos is a functional hot beverage. It is desired mainly because of its health benefits and its flavour. It contains no caffeine, has very little tannin, is high in antioxidants, and is a proven anticarcinogen. Rooibos is often used to bathe babies and children who suffer from allergic skin conditions or make a thirst-quencher and sports drink, because of its mineral content of iron, potassium, zinc

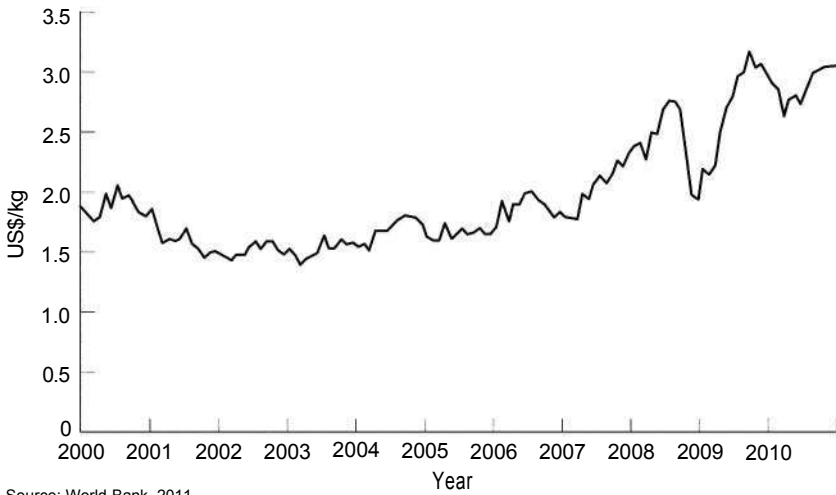


FIGURE 17.1

and sodium (USDA 2006). The demand for Rooibos increased for its functional attributes and, as South Africa is the only producer with a limited production area, one would have thought that the gap between demand and supply would increase within the following years. However, nowadays Rooibos producers face the problem of overproduction and, since 2001, producer prices decreased substantially. For instance, while a price of 16,000R per ton was paid in 2004¹ only 500R per ton were paid in 2010 (AFF 2010). Thus, Rooibos production faces similar problems concerning a possible positive supply-demand balance as teas traded over the conventional market.

Rooibos represents about 0.3 per cent of total world tea sales and about 10 per cent of the herbal tea market and the natural health product market (Biénabe and Leclercq 2007). In South Africa, the only producer of Rooibos, its production provides permanent and seasonal employment opportunities and income to more than 5,000 people both in the farms and processing plants (AFF 2010).

Expressed in Rand, the gross value of production of Rooibos tea increased from about 40,000R to about 130,000R between 2001 and 2004 and, after a decline in the following two years, reached a peak in 2007 and 2008 to approximately 157,000R. Since then, the gross value is decreasing. While the declines in gross values can be attributed to declines in producer prices, the increases can be explained by increases in the volumes of Rooibos tea exports. Figure 17.2 shows that tea exports increased considerably between 1999 (about 1,800 tons) and 2009 (6,000 tons) with a slight decline in 2004 and 2005.

Similar to the exports, production also increased strongly over time. Whereas in 1995, the production volume was about 4,200 tons (Biénabe and Leclercq 2007), approximately 6,000 tons were produced in 2001 and around 18,000 tons in 2010 (AFF 2010). Despite a slight decline in 2004, no fluctuations in production were observed within this period (AFF 2010). The estimated production volume of fair trade Rooibos is only 18 tons (AFF 2010) but growth is expected (Waarts and Kuit

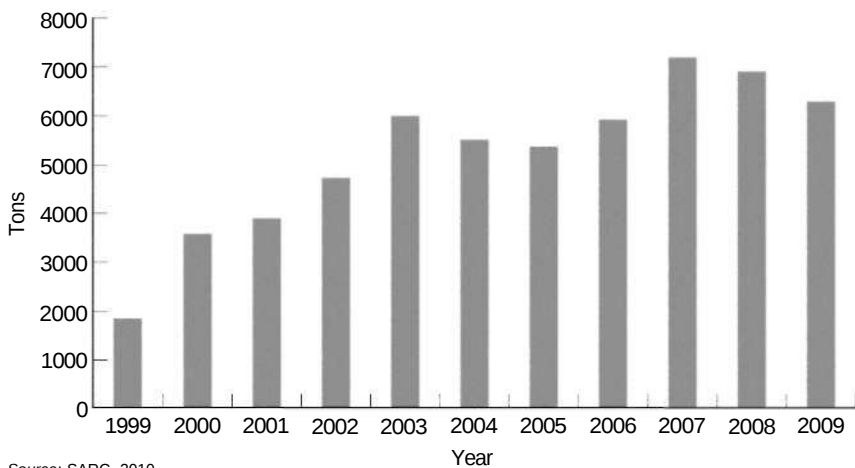


FIGURE 17.2

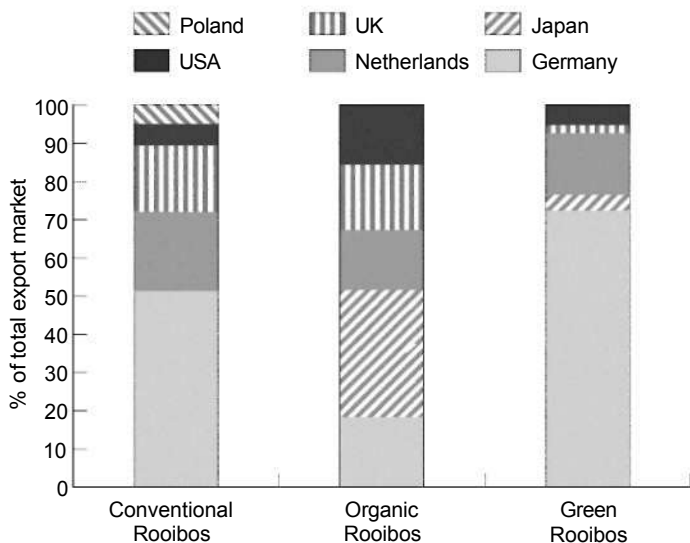
2008). The production area of Rooibos has doubled since 1997, reaching 37,000ha in 2005 (USDA 2006; Waarts and Kuit 2008). The expansion was driven both by new entrants in the sector and expansion of existing plantations. While the clearing of land is much more difficult today than in the 1990s, the current Rooibos market is characterized by over-supply and decreased prices (Waarts and Kuit 2008).

On average, South Africa produces 12,000 tons of Rooibos per year and consumes 4,500–5,000 tons (SARC 2008). Thus, 60 per cent of the production is exported, the remaining 40 per cent is consumed domestically. Conventional Rooibos is the predominant segment, followed by organic and green Rooibos that make up 12 per cent of the export market share between 2003 and 2007 (AFF 2010).

Rooibos is exported to more than 30 countries across the globe but the major export destinations are Germany, the Netherlands, the UK, Japan and the US. Conventional Rooibos tea makes up the highest volume of exports with 4,360 tons in total in 2010, followed by Organic Rooibos with 683 tons and Green Rooibos with 248 tons. Furthermore, South Africa exported 13.5 tons of Fair Trade Rooibos to the UK and Germany in 2005, and the United States is also an important export country for Fair Trade Rooibos (AFF 2010). Figure 17.3 shows that Germany imports 51 per cent and even 72 per cent of total conventional and Green Rooibos tea exports. Furthermore, Germany is the second largest export country for Organic Rooibos tea with 18 per cent, behind Japan with 33 per cent (SARC 2010).

Uniqueness of Rooibos

Rooibos is a legume and part of the genus *Aspalathus* (Wilson 2005). Rooibos Tea (*Aspalathus linearis*, Fabaceae) is a shrub of 0.5–2m in height, with bright green, needle-shaped leaves that turn a rich reddish-brown colour upon fermentation and



Source: SARC, 2011; AFF, 2011

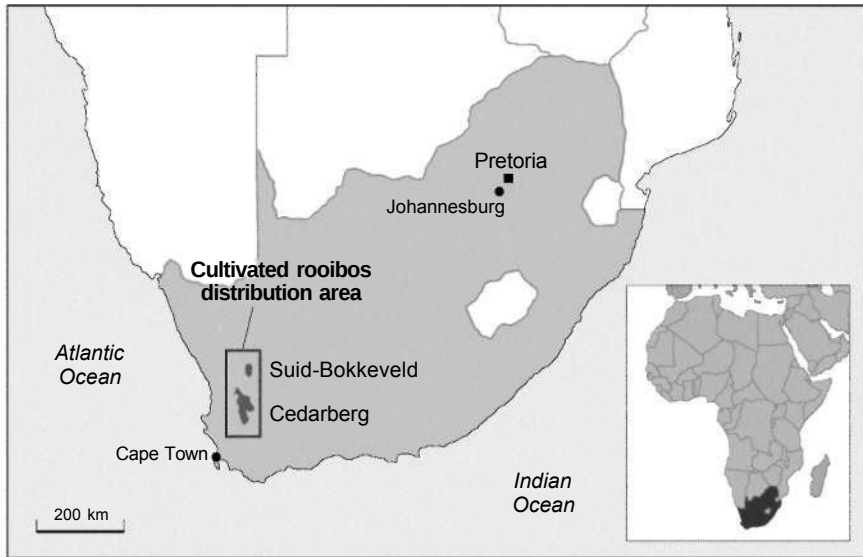
FIGURE 17.3

occurs in different ecotypes: the domesticated or ‘Nortier’ cultivar, which is planted by producers, and secondly, a range of ‘wild’ or naturally occurring ecotypes (Nel et al. 2007).

Rooibos is unique to the Cape floral kingdom, known locally as the fynbos, which has the distinction of being both the smallest of the world’s six floral kingdoms, and the only one occurring entirely within the borders of a single country (Editors Inc 2002). Fynbos constitutes the main land cover in the Cape floristic region, which has the densest known concentration of plant diversity in the world (Cowling et al. 1997). Rooibos grows exclusively in the Northern and Western Cape province of South Africa, specifically in a small area 200km north of Cape Town, the Cedarberg Mountain region and around Clanwilliam and Citrusdal (see Figure 17.4). The Cedarberg area is a rocky range with a Mediterranean climate (Cowling et al. 1997). The uniqueness of the production area of Rooibos is defined by its rainy winters (while the rest of South Africa generally has rain in summer) and dry summers, the altitude, the acidic and the coarse sandy soil (Gerz and Biénabe 2006).

Originally, the term ‘Rooibos’ was locally used but nowadays, due to sophisticated marketing strategies, different terms exist, especially at the German market. The tea is said to have certain health-giving properties, it is caffeine-free and contains compounds which act as anti-oxidants (Nel et al. 2007).

Up to date, the industry is in the process of finalizing the specifications and has therefore agreed upon four different specification areas, namely: (i) the delimitation of the area; (ii) the production practices; (iii) the harvesting standards; and (iv) the processing procedure (Troskie 2007; Biénabe and Troskie 2008).



Source: Leclercq, 2007

FIGURE 17.4

Delimitation of the area

It must be an area with winter rainfalls;
 The substrate must be a derivative of Table Mountain Sandstones;
 It must have deep, well-drained sandy soils;
 The pH of the soil must be below 7; and
 It must be in the fynbos biome.

Production practices

Production must take place in the delimited area;
 Biodiversity standards are being developed;
 It must be produced under dryland conditions;
 Irrigation is allowed on the condition that no irrigation takes place within the two months prior or during harvesting.

Harvesting standards

It must be annually harvested;
 At least 20 per cent of the leaves must be retained

Processing procedure

It must be delivered to the tea court within 72 hours;
 The green material must be cut to 1–10mm;

Silage must be placed in row-like heaps;

It must be placed in a specified manner in the sun and wetted to 60 per cent moisture content;

The leaves must be bruised for fermentation;

No catalysts may be added to the product in order to facilitate fermentation;

The fermentation process must take between 12–16 hours to achieve the specific odour and colour;

Following the fermentation the product must be spread in the sun (1,000m²/ton) for drying below 10 per cent moisture;

It must be dried in the sun to a moisture content of less than 10 per cent;

It must be stored in a cool, dry place;

All health regulations of the tea court must be adhered to, such as bacteria-steam sterilization;

The tea court itself must be in the delimited area.

Beside the production side and processing standards, Rooibos is said to contain several healthy ingredients that might add to the uniqueness. While several minerals and trace elements were found, these values are too low to make any health claims and are even too low to be published on tea packaging in future. For instance, a typical cup of 200ml Rooibos contributes less than 2 per cent to the recommended daily allowance of these minerals and according to the current legislation a minimum of 15 per cent must be present (SARC 2010).

The supply chain

The production of Rooibos involves around 400–450 farmers (Biénabe et al. 2008). Two types of producers can be distinguished in the South African Rooibos production. Small-scale farmers and underprivileged communities produce around 2 per cent of the total output and still produce wild Rooibos (Gerz and Biénabe 2006). They grow Rooibos on plots ranging from 0.2ha up to 18ha (EMG 2006). The majority are large-scale farmers with 1,500–2,000ha (or even up to 5,000ha) (EMG 2006) producing 98 per cent of the whole output (Leclercq 2007).

Even though Rooibos cultivation practices have evolved considerably, processing still relies on traditional methods, which trace back to the Khoisan people, except that methods nowadays are more mechanized and refined. The Rooibos plant is first harvested 18 months after planting. It is then harvested annually during the summer by cutting the branches 50cm above the ground. Though manual picking is still largely dominant, 30 per cent is harvested mechanically. The harvested Rooibos is bound into bundles and taken to the first-stage processing unit, the tea court (Gerz and Biénabe 2006), in most cases on the farms.

Rooibos second-stage processing, namely sterilization, is highly concentrated and dominated by eight large companies that collect either wet or dry (after first-stage processing), transform and sell the Rooibos to the intermediaries (Leclercq 2007) and are mainly located in the Cedarberg production zone (Gerz and Biénabe 2006).

Rooibos Ltd is the dominant role player of the South African industry, channelling about 75 per cent of the production in total. Some 200 producers retain the majority of the company's shares and are its main suppliers through a fixed annual price system. The company arose from the state-owned Rooibos Tea Control Board, which was created in 1954 to organize the production and the marketing of Rooibos. This organization voluntarily dismantled in the 1990s and its assets were shared among the producers who then founded Rooibos Ltd. The company has an own brand but mainly sells tea in bulk, which is then marketed under downstream players brands (Gerz and Biénabe 2006).

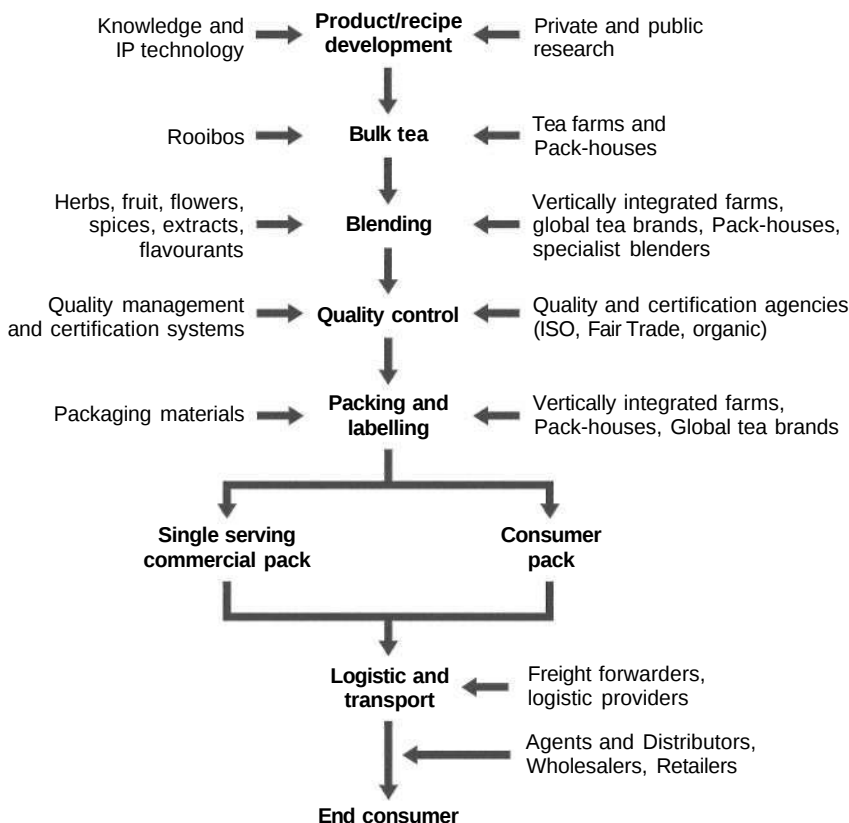
Rooibos Ltd dominates the domestic market with a market share of 90–95 per cent in particular through its long-term contract with the Freshpak brand that is part of the national brands group. Processing companies like Rooibos Ltd rely mainly on large-scale producers and only 1–3 per cent of their suppliers are small-scale producers. On the international level, Rooibos Ltd holds a market share of 50–60 per cent (<http://rooibosltd.co.za>) and the distribution is mainly controlled by German brokers (Biénabe et al. 2008). For exports, a wide range of products and trademarks, as well as various labels, are present (Gerz and Biénabe 2006). The trademarks are usually owned by the traders (<http://rooibosltd.co.za>).

The quality control is done by the Perishable Products Export Control Board (PPECB) of South Africa that ensures that all exported Rooibos products pass a plant health and safety inspection and are certified to be free of bacteria and impurities (SARC 2008).

Most of the small-scale farmers are members of two cooperatives that produce Rooibos for the fair trade and organic market (Leclercq 2007), the Heiveld Cooperative and the Wupperthal Rooibos Association (Gerz and Biénabe 2006). These small processing enterprises contract out the sterilization stage (Gerz and Biénabe 2006) but are engaged in the marketing.

With the support of the NGO Environmental Monitoring Group and the Northern Cape Department of Agriculture, the Heiveld Cooperative was founded in 2000. The cooperative was the first organization to market sustainably harvested wild Rooibos, which requires farmers to follow a code of sustainable harvesting practices. The products, certified by the EU (public standard), Naturland (private standard) and by the Fair Trade Labelling Organization (FLO), are sold as organic and fair trade on the international market (Gerz and Biénabe 2006). During 2005/2006, 42 farmer members produced 36 tons of organic Rooibos, achieving a financial turnover of R. 1.5 million (Nel et al. 2007).

The Wupperthal Rooibos Association is an isolated rural community in the Cedarberg Mountains and was created 1998 with 40 members. In 2005 the association counted 170 small-scale farmer members. The association is assisted by the development agencies, especially the NGO Agribusiness in Sustainable Natural African Plant Production (ASNAPP). Rutgers University has helped them set good agricultural practice, good field harvesting practices and good manufacturing practices. In 2005 the association received full organic certification. The output has averaged 80 tons a year but with a high variation dependent on climate conditions (Gerz and Biénabe



Source: AFF, 2010

FIGURE 17.5

2006). At present, 10 tons are harvested from wild plants and more than 70 tons from plantations. Individual farmers produce between 200kg and two tons, employing up to eight labourers, ensuring significant employment benefits in the local community (Nel et al. 2007).

Marketing strategy

Marketing for Rooibos is based on private firms branding. According to a Rooibos tea-drinking study conducted by the South African Advertising Research Foundation, in South Africa 7.076 million (23 per cent of total population) of the adult population are Rooibos drinkers. Of the total Rooibos drinkers, 39 per cent are light drinkers, 34 per cent are medium drinkers, and 27 per cent are heavy drinkers. Branding played an important role towards consumer demands. Freshpak Rooibos was the most popular (26.3 per cent), followed by Joko (23.3 per cent), Eleven O’Clock (18.7 per cent), and 14.1 per cent shared by Glen, Laager, Vital, Southhalls,

Twinings and Phendula tips respectively (*Business Day*, 5 April 2006, in USDA 2006). The producer price for commercial Rooibos for the export market is US\$2.9 (€1.9) per kilogram. The consumer price on the domestic market is US\$10.5/kg (€6.6/kg) and on the export market US\$22.5/kg (€14.6/kg). The Rooibos is in general profitable for the producers (Biénabe and Leclercq 2007). However, prices declined substantially from 2005 due to production increases.

On the fair trade market, two companies are operating: The Wupperthal Association and the Heiveld Cooperation. Members of the Wupperthal Association earn €1.8/kg if the tea is sold on the domestic market but virtual everything is sold at the international market. Exported as fair trade, the same quantity can be sold for €2.5/kg plus a premium of 10 per cent of the domestic price level for Rooibos tea (EZA, undated). The fair trade premium is €0.5/kg (Nel et al 2007).

The income of members of the Heiveld Cooperative could increase their earnings from €1/kg in 2001 to €2/kg in 2003 to €2.5/kg in 2004. The cooperative's minimum wage for tea planters and harvesters is almost double the legislated minimum for the area. In 2003, the cooperative made a profit of €19,624, of which €13,737 was distributed to members on the basis of the amount of business each had done via the cooperative. The rest (€5,887) was shared equally among the less advantaged members (EMG 2006; de los Santos in Gerz and Biénabe 2006).

In March 2005, the Heiveld Cooperative was exploring the possibility of increasing its revenue by working directly through independent agents in Europe, a project which is now running. Respondents commented that fair trade buyers pay €2/kg (23 R/kg), whereas independent agents in Europe could pay up to €4/kg (44 R/kg). Commercial Rooibos, by comparison, sells for €1.2/kg (14 R/kg) in world markets. Due to overproduction and price decrease, the prices paid by independent Europe agents is less nowadays, but still higher than Rooibos sold over the conventional market.

During 2009, the South African Rooibos Council (SARC) launched its first generic marketing campaign on the local (South African) market. The campaign objectives included promoting Rooibos as a unique, wellness product and a true South African icon, as well as increasing awareness of its versatility. Beside advertorials and competitions in consumer magazines, a range of Rooibos for Life-branded products such as gym bags and baby carriers were produced. Also the FIFA World Cup was taken as opportunity to promote Rooibos. Furthermore, to increase the awareness of consumers and promote Rooibos locally and globally, SARC is in contact with PM-Kommunikation in Germany (who already successfully promotes Wines of South Africa) and with Meropa Communications in South Africa (who launched campaigns such as the WWF's Earth Hour and Braai Day) (SARC 2010).

GIs in national and international law

In South Africa, only wine and spirits are protected by the Wine of Origin Scheme, which has 22 regulations to date, including delimitation of the geographic areas. This scheme is an absolute success (Troskie 2007), which can be seen by the increase of

1382 per cent over the period between 1985 and 2006 of wine certified under this scheme (SAWIS 2007). The system allows the co-existence of trademarks and GIs. Concerning the GI, the producer can decide to produce Estate Wine of Origin sourcing all grapes from one specific estate or decide to have Wine of Origin from bigger elimination and source the grapes from a number of farms. This is possible since the system makes provision for (Troskie 2007):

3	geographical units
5	production areas
21	districts
56	wards
129	estates
Single	vineyards

For non-alcoholic products, the current legal framework only provides for the protection of GIs as collective trademarks. As South Africa regards the word 'Rooibos' as a national good, it cannot nationally be registered as trademark (Gerz and Biénabe 2006). To benefit from an international geographical indication as provided for by the WTO Agreement on TRIPS, South Africa must first establish a national law regarding non-wines and spirits GIs and prove that Rooibos is protected at the national level. While the possibility of international production of Rooibos due to a lax Intellectual Property protection regime is known, no legislation on geographical indicators have been developed so far (AFF 2010). The Western Cape Department of Agriculture drafted a legislative framework for the protection of specialty products in 1999/2000, which was withdrawn by the national government. Their reason for this withdrawal was the fear about losing trade opportunities when other countries would do the same for specific products from their country. Furthermore, Rooibos is commonly accepted as being a generic term for the plant (Waarts and Kuit 2008).

Hence, the legal framework for Rooibos currently relies on the trademark regime. A multitude of private and collective trademarks exist, owned mainly by the traders (Gerz and Biénabe 2006). Examples for trademarks are: Freshpak Rooibos, Joko, Eleven O'Clock, Glen, Laager, Vital, Southhalls, Twinings and Phendula, Clantee, Ou Huis, Annique, Perfect Rooibos Baby Tea (Downes and Laird 1999; USDA 2006). In European countries, Rooibos is also traded as fair trade, organic or as 'wild Rooibos' (Gerz and Biénabe 2006).

Challenges for South Africa's Rooibos tea

The European export market has a special role in fair trade and organic certified products (Gerz and Biénabe 2006) but the major problem is that about 95 per cent of the product is currently exported in bulk and it follows a significant opportunity for down-stream value adding exists (Troskie 2007; Biénabe et al. 2008). The weak position at the international market is one of the most serious challenges South African Rooibos producers face. At the international level, the market power is in the

hand of German traders who can easily dictate prices especially for conventional bulk exports. Furthermore, different opinions concerning the perceived commoditization of Rooibos tea and the international marketing strategies exist in the industry. While large-bulk processors favour marketing Rooibos as a black tea alternative and generic marketing, smaller players wish to market it as a niche product to limit supply and generate higher margins (AFF 2010). However, the South African Rooibos Council makes great effort to promote Rooibos on the local and global market.

There exists evidence that Rooibos trademarks are usurped, being used for packaging and selling other teas or blended teas. Teas with very low proportion of actual Rooibos or mainly sticks are labelled and marketed as Rooibos (Biénabe and Leclercq 2007). Between 1993 and 2003 the export market grew by 742 per cent and usurpation was the main driving force for the Rooibos GI initiative (Biénabe et al 2008). As international demand growth is phenomenal, it is expected that other countries will start producing Rooibos. This is especially a problem, as the Rooibos plant might be adaptable (at least in some regions, such as Australia) and could thus thrive outside its natural habitat (Gerz and Biénabe 2006).

Rooibos tea is marketed under several trademarks with and without the term 'Rooibos' in the name. However, companies (at least in the US) are not allowed to protect the term 'Rooibos', which is the result of a ten-year legal fight of Rooibos Ltd.

For several years, Rooibos Ltd was involved in a lawsuit dealing with the problem of trademark protection of a generic term 'Rooibos' to retrieve the right to sell the company's products under the name 'Rooibos' in the United States. In 1994, Forever Young (Pty) Limited registered the name 'Rooibos' in the US and numerous other countries, in an attempt to restrict the use of 'Rooibos' to those willing to do business with Forever Young. In 2001, Forever Young assigned the registration of 'Rooibos' to Virginia Burke-Watkins of Dallas, Texas. By restricting the use of the name 'Rooibos' to only those companies prepared to enter into a business relationship with Burke-Watkins, great hardship was caused not only to many independent US tea manufacturers and US retailers but also to Rooibos Ltd. Many companies, who used Rooibos individually or in formulations, had to create alternative names such as Red Tea and Red Bush, leading to great confusion in the minds of tea drinkers. After ten years and nearly US\$1 million in legal fees, Rooibos Ltd has reached a settlement agreement with Burke-Watkins and Forever Young over the rights to the use of the generic term 'Rooibos'. Under the terms of the settlement agreement, the latter two parties have voluntarily and unconditionally agreed to cancellation of their registration of the word 'Rooibos' in the US and various other countries (christiecomm.com). Nowadays, the term 'Rooibos' alone cannot be protected as trademark, although the trademark registration is still possible for 'Rooibos' in combination with other words. One example of how Rooibos tea is protected under the trademarks protection scheme are the trademarks of the US company Redtea that protect Rooibos as trademark under 'Pure Red Tea', 'Ruby Red Tea', 'Real Red Tea', 'Organic Red Tea', and 'South African Red Tea'. Another example is the Red Bush Tea Company, a UK importer, who protects its Rooibos under the trademarks 'African Rooibos Tea' and 'African Red Bush Tea'.

Value distribution within the supply chain and social and environmental effects

Rooibos is a product generating a high value on the international market. Several trademarks are used to signal Rooibos products, such as natural flavour, flavoured, fair trade or organic teas, ice teas and cosmetic products. An increasing interest can also be observed in non-fermented Green Rooibos, that is said to contain more antioxidants than its fermented 'red' counterpart.

Regarding Rooibos tea offers of German retail companies, high-price differentials exist between natural and flavoured Rooibos teas (see Table 17.2). In general, flavoured non-organic teas are priced higher than natural teas but high variances comparing different companies exist. Some companies sell their natural Rooibos for €11/kg more than others, and for flavoured teas price differences of more than €28/kg can be observed. Natural Rooibos tea is offered for between €15.90 and €27/kg, flavoured teas are offered for between €20.30 and €48/kg and organic teas are offered for prices exceeding €40/kg even up to €60/kg if the tea is an organic and flavoured tea.

All prices in Table 17.2 below are prices of German retailers for loose tea in 1kg bags, including value added tax and excluding transport. These data should only give an idea about prices that can be generated in one of the most important export markets for Rooibos tea. Comparing retailer/importer prices with producer prices (€2.20/kg)² one can identify a price approximately ten times higher, which is (even if not corrected for transportation costs) a lot for not labelled loose tea. For cosmetic products, one can even expect higher price differences.

As most of the tea is exported in bulk, even for the main exporter, Rooibos Ltd, it is impossible to capture the added-value. According to Biénabe and Leclercq (2007)

TABLE 17.2 Rooibos prices of a sample of tea retailers on the German market

<i>Company</i>	<i>Product</i>	<i>Quantity (loose)</i>	<i>Price in euro (including VAT, excluding transport)</i>
Tee Kontor	Natural Red and Green	1,000g	25–27
	Rooibos Flavoured Red and Green Rooibos	1,000g	27.5–29.5
Tee Schatzkammer	Natural Organic Red	1,000g	40
	Rooibos Natural Organic	1,000g	44
	Green Rooibos Flavoured	1,000g	40–48
	Rooibos Flavoured Organic Rooibos	1,000g	42–60
Weltecke	Natural Rooibos Flavoured	1,000g	20.40
	Rooibos	1,000g	21.24–22.21
Tee Berger	Flavoured Rooibos	1,000g	18–26
Tee	Natural Rooibos Flavoured	1,000g	26.35
Gschwender	Rooibos	1,000g	30.17–36.55
Tee-Express	Natural Rooibos Flavoured	1,000g	15.90
	Rooibos	1,000g	20.30–22.90

Source: Websites of the different companies (accessed 5 August 2008)

the export of new and differentiated products using a labelling strategy, as well as the use of byproducts, would be an opportunity for the Rooibos industry to capture some value-added. The strength of Rooibos is that the product is well-known as a South African product (Biénabe and Leclercq 2007). If it would be possible to fairly distribute the value-added between the different supply chain actors a differentiation strategy would benefit the whole region. This is, because the region where Rooibos grows is typically characterized by communities with limited opportunity for economic growth and formal employment, often resulting in few inhabitants being economically active (Grant 2005). Being a labour-intensive industry, the increase and distribution of added-value in these regions would increase income and provide job opportunities.

However, some difficulties would have to be overcome before or along with the introduction of a GI. To date, South African companies have very little success with exported products in retail-packed format. A clear challenge would be to ensure better control over the Rooibos quality and to combine the GI and the biodiversity conservation strategy, as Rooibos is being produced in and attached to a highly biodiverse area (Biénabe and Leclercq 2007). As most Rooibos producers are not smallholders, but are large-scale producers and the processing sector is also highly concentrated, large players have a powerful market position as well as the financial means to make the investments needed to capture benefits from commercial Rooibos markets (Gerz and Biénabe 2006). Thus, further important considerations are to foster collective and even territorial dynamics at the level of the Rooibos production area that could support the needs for inclusiveness and rural development in a context marked by some isolation of the small-scale farmers' communities from the rest of the industry, but also by strong competition among processors (Biénabe and Leclercq 2007). One example of such a collective organization with territorial dynamics is the 'Rooibos heritage route' developed by small-scale producers, a project that was supported by the government and NGOs.

Concerning environmental effects, an increase in demand raises the issue of sustainable practices. While there is currently an oversupply of Rooibos, the situation may reverse in the future (Waarts and Kuit 2008). Concerns have been raised over the impact of land clearing in the fynbos areas. Further concerns regarding sustainability arise in areas such as Wupperthal, where there is limited land available for cultivation as the community is situated in a natural reserve (Grant 2005). To protect the fynbos biome, the government has designated wilderness areas and reserves and cooperates with NGOs to implement sustainable land management practices with local communities and producers (Waarts and Kuit 2008). The only sustainable initiative financed by producers is the Rooibos and Biodiversity Initiative (RBI) which was launched by the South African Rooibos Council and CapeNature in 2007. Its objective is to develop guidelines and increase sustainable land management practices. The majority of guidelines could be adopted from Potato and Biodiversity Initiative, which is active in the same physical area (Waarts and Kuit 2008). Also, a geographical indication may improve sustainable Rooibos production by regulating production practices in the code of practice. To maintain good reputation, care should be taken that the large-scale commercialization of Rooibos does not become associated with harmful

environmental practices. In addition, maintaining environmental sustainability would open the possibility to promote tourism in the region and bring further economic benefit to the community (Grant 2005).

Conclusion

Rooibos is an impressive commercial success. Production volume has increased steadily within the last two decades. Whereas in 1995, the production volume was about 4,200 tons, it grew to 6,500 tons in 2000, to 9,700 tons in 2005 and even 18,000 tons in 2010 (Biénabe and Leclercq 2007; AFF 2010). As one of the main importers of Rooibos in the 1990s, Germany is still South Africa's major export destination for Rooibos tea with 75 per cent of export sales (USDA 2006; Troskie et al. 2006).

The product uniqueness comes from a very specific ecosystem that leads to clear limits of the production geographical area. However, the supply chain has a low negotiation power. About 95 per cent of the product is currently exported in bulk. At the international level, the market power is in the hand of German traders who can easily dictate prices especially for conventional bulk exports. The price paid to the producers in South Africa is very low compared to prices paid for bulk products in Germany.

On environmental aspects, the major challenge is over exploitation of natural resources due to a growing demand.

Notes

- 1 In 2004, the turnover in the Rooibos industry was estimated at €22.5 million (Gerz and Biénabe 2006).
- 2 Price information was taken from the SinerGi Datacard that was dated 16 April 2007 with an average price of US\$2.90/kg for Rooibos. This amount was transferred to euros with the exchange rate of 5 April 2007 of the Amtsblatt der Europäischen Union (2007/C78/04).

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18

ZANZIBAR: CLOVES

M. Blakeney and G. Mengistie

Introduction

The United Republic of Tanzania is made up of two countries, namely Tanganyika (now 'Mainland Tanzania') and the Islands of Zanzibar and Pemba, collectively known as 'Zanzibar'. The primary focus of this GIs case study is the cloves industry of Zanzibar. Mainland Tanzania is considered in the context of other industries that have GIs potential. Zanzibar was selected as the primary focus because it already has in place the appropriate legal infrastructure for the protection of GIs.

Physical geography

Tanzania is bordered by Kenya and Uganda to the north, Rwanda, Burundi and the Democratic Republic of Congo to the west, and Malawi, Mozambique and Zambia to the south. The country's eastern borders lie on the Indian Ocean. Tanzania is 947,300km², lying between latitudes 1° and 12°S, and longitudes 29° and 41°E. This means that Tanzania has a wide range of physical geography and climatic types. It is mountainous in the northeast. To the north and west are the Great Lakes of Lake Victoria (Africa's largest lake) and Lake Tanganyika (Africa's deepest lake). Central Tanzania comprises a large plateau, with plains and arable land. The eastern shore is hot and humid, with the islands of Zanzibar and Pemba lying offshore.

Zanzibar is a semi-autonomous part of the United Republic of Tanzania, in East Africa. It comprises the Zanzibar Archipelago in the Indian Ocean, 25–50km off the coast of the mainland between latitudes 5° and 7°S of the Equator. The two main islands are Zanzibar (Unguja) and Pemba. The total land area of Zanzibar is estimated to be 2,654km² with Unguja having 1,666km² and Pemba 988km². The highly fertile soil is the most important natural resource for both islands. Neither island is known to contain any mineral deposits or precious stones of commercial value.

Human geography

In 2006 the Tanzanian population was estimated at 38,329,000 persons, with an estimated growth rate of 2 per cent. Population distribution is uneven, with density varying from 1 person per square kilometre in arid regions to 51 persons per square kilometre in the mainland's well-watered highlands, to 134 per square kilometre on Zanzibar. More than 80 per cent of the population is rural. Relevant to the human component of GIs is the fact that the majority of Tanzanians come from the Sukuma and the Nyamwezi Bantu peoples. Some Nilotic peoples, such as the Maasai and the Luo, live in Tanzania, but larger numbers are found in neighbouring Kenya. The Sandawe and Hadza peoples share the languages of the Khoisan people of the Kalahari in South Africa. The population also includes people of Arab, Indian, and Pakistani origin.

The population of Zanzibar is around 1 million persons. The first permanent residents of Zanzibar came from the East African mainland around 1000 AD and comprise the majority of the population. Asians, originally from India and Arab countries, form a small minority. Pemba has a population of around 300,000 persons with a similar population composition to that of Zanzibar. In the 15th century, Zanzibar was part of the Portuguese Empire. In 1698, it fell under the control of the Sultanate of Oman, which developed spice plantations. In 1890, Zanzibar became a protectorate of Britain until December 1963, when it became an independent sultanate. It became a republic in January 1964. In April 1964, it joined Tanganyika to form a new republic which was renamed Tanzania in October 1964.

Economy

The Tanzanian economy is mostly based on agriculture, which accounts for more than half of the GDP and employs about 80 per cent of the workforce. Topography and climate limit cultivated crops to only 4 per cent of the land area. Zanzibar's main industries are spices (cloves, nutmeg, cinnamon and pepper), raffia and tourism. The greatest concentration of clove trees is found on Pemba (3.5 million trees) as the growing conditions are superior to those on Unguja Island.

During the year ending April 2010, the value of Tanzanian exports of goods and services increased to US\$4,923.8 million, from US\$4,543.2 million recorded in the corresponding period a year earlier. The improvement was largely due to increase in travel receipts (mainly tourism) and export of goods, particularly gold, as other minerals and traditional exports declined (Bank of Tanzania 2010: 15). During the year ending April 2010, the value of traditional exports of coffee, cotton, tobacco, cashew nuts, tea and cloves declined to US\$446.3 million from US\$474.1 million recorded in the corresponding period in 2009 due to decline in the export volumes of all traditional exports as well as in the unit price of coffee, cotton and cloves.

During the year ending April 2010, the values of manufactured goods and re-exports were US\$584.5 million and US\$111.3 million, being lower than US\$642.8 million and US\$120.2 million recorded during the preceding year. The decline in manufactured good exports is partly associated with the decline in demand in the neighbouring countries following the global financial crisis.

The contribution of non-traditional exports for the year ending April 2010 was: gold 52 per cent, manufactured goods 23 per cent, fish and fish products 5 per cent, oilseeds 3 per cent, edible vegetables 3 per cent, horticultural 1 per cent (Bank of Tanzania 2010: 18).

The importation of goods and services amounted to US\$8,026.9 million in the year ending April 2010, compared with US\$7,849.1 million recorded in the corresponding period a year before. The value of goods imported increased slightly to US\$6,321.5 million, compared with US\$6,204.7 million recorded during the year ending April 2009, largely due to a rise in the value of imported oil, food stuffs and other consumer goods. The value of imported oil increased to US\$1,716.7 million compared to US\$1,592.2 million in the preceding year, due to volume effect as average price of oil in the world market remained low. In the same period, imports of capital goods declined to US\$2,540.4 million compared with US\$2,651.2 million recorded during the preceding year (Bank of Tanzania 2010: 19).

Assessments conducted in March 2010 by the Ministry of Agriculture Food Security and Cooperatives revealed that 717,684 people in 47 districts were facing food shortages, requiring food relief of 21,604 tons in March through May 2010 (Bank of Tanzania 2010: 2–3). Hence food aid during the period is estimated at 2,160 tons free of charge and 19,444 tons at subsidized price. Meanwhile, wholesale price for major food crops declined during the year ending April 2010, with exception of potatoes, sorghum and beans. However, on a month-to-month basis, the wholesale price of all selected food items decreased, following the increase in food supply associated with short rain crop harvest.

Zanzibar trade

Total exports of goods and services amounted to US\$125.4 million, compared to US\$116.8 million realized during the year ending April 2009. The improvement was largely due to increase in exports of cloves, seaweeds, manufactured goods, fish and fish products. Clove shipments rose to US\$12.2 million from US\$8.1 million, mainly associated with an increase in production volume from 2,200 tons to 3,400 tons (Bank of Tanzania 2010: 34).

GIs legislative infrastructure

Both Tanganyika and Zanzibar were British colonies with a common law legal system. Although these two former states united in 1964, they still maintain separate trademark laws and registration systems. Consequently, protection sought in one part of the union will not extend to the other part. To obtain trademark protection throughout the union, protection must be sought in both Tanganyika and Zanzibar (by filing separate trademark applications).

In Tanganyika, trademarks were governed by the Trade and Services Marks Act (TSMA), enacted in 1986, which became operational only in October 1994. The Tanganyika Merchandise Marks Act 1963, which was enacted to combat

counterfeiting activities did not become operational until 15 April 2005 due to the delay in the publication of the commencement notice in the official *Gazette*. This law was updated by amendments in the Written Laws (Miscellaneous Amendments) (No. 2) Act 2007.

Section 16(1) of the TSMA provides for the registration of distinctive marks. Section 19 provides that a mark cannot be registered if it would be likely to deceive or cause confusion as to the geographical origin of a product. Section 34 of the TSMA provides that no registration of a trade or service mark shall interfere with the *bona fide* use by any person of his own name or of the name of the geographical location of his business. No provision is included in the TSMA for the registration of collective or certification marks. No provision is made in any legislation for the registration of GIs in mainland Tanzania.

In Zanzibar, before September 2008, trademarks were governed by the Trade Marks Decree 1930. In 2008, this was replaced by the Zanzibar Industrial Property Act 2008, which came into force from 13 September 2008. This law consolidates and codifies industrial property law with separate divisions on trade and service marks, including collective and certification marks and GIs, as well as the other categories of industrial property.

Under section 46(2) of the Zanzibar Industrial Property Act 2008 (Zanzibar Act) trademarks are registrable provided they are distinctive. Section 48(4)(c) provides that marks may be denied registration when according to the customs of the trade they are used to indicate the place of origin of the goods with which they are used.

Section 51 of the Zanzibar Act provides for the registration of collective marks and section 52 provides for the registration of certification marks.

Section 60 of the Zanzibar Act provides for the registration of GIs. 'Geographical indications' are defined in section 2 as 'an indication which identifies a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the product is essentially attributable to its geographical origin'. 'Good' is defined in section 56(a) as 'any natural or agricultural product or any product of handicraft or industry'. Section 59 disqualifies from registration GIs which do not meet the statutory definition in section 2, or which are not or have ceased to be protected in their place of origin.

Under section 60, an application for registration may be filed with the Registrar by 'any person carrying on an activity as a producer in the geographical area specified in the application, with respect to the product specified in the application'. Section 61 provides that the application shall specify:

- (a) the name, address and nationality of the person filing the application, and the capacity in which the applicant is applying for registration;
- (b) the geographical indication for which registration is sought;
- (c) the geographical areas to which the geographical indication applies;
- (d) the products for which the geographical indication applies; and
- (e) the quality, reputation or other characteristic of the products for which the geographical indication is used.

Upon registration, section 63 provides that no person, other than a producer carrying on an activity in the geographical area specified in the Register, shall have the right to use a registered GI in the course of trade with respect to the products specified in the Register, and which possess the quality, reputation or other characteristics specified in the Register.

Section 57 permits any interested person or group of consumers or producers to bring action to prevent the misleading use of GIs.

No GIs have yet been registered in Zanzibar, as the 2008 Law, including its GI provisions, requires implementing regulations.

Cloves case study

Introduction

The word ‘clove’ originates from the Latin ‘*clavus*’ meaning a nail, which derives from the shape of the spice. The clove, originating from the Moluccan Islands (today in Indonesia), was introduced in Zanzibar from Mauritius in 1818 (Ellman 2002). The clove tree is very sensitive to ecological conditions, which is why it is not cultivated in many parts of the world. The clove tree can be harvested six years after planting. The yields increase gradually and the highest yields are obtained from the 30th to 40th year. The maximum useful life span of a clove tree in fertile soil and in areas with suitable climate is about 70 years. In both Unguja and Pemba, because of the decline in market prices for cloves, clove farmers have not undertaken to plant new trees, or they have used the timber from the clove tree for charcoal and for furniture. Factors related to harvesting of cloves are also responsible for the decline in production. Inexpert persons involved in harvesting cause extensive damage to tree branches, which take at least two years to recover to full production. Clove picking in the island is labour intensive and there has recently been a problem of unavailability of clove pickers. Also Zanzibar has not been able to benefit from technological advancement linked to clove picking practised in other clove-growing countries. Harvesting expenses also discourage farmers from clove cultivation.

These harvesting difficulties and the removal of existing trees and the failure to plant replacement trees has led to a substantial decline in Zanzibar’s clove production. For example it is estimated that between 1950/1951 and 1959/1960, Zanzibar had a clove tree population of 5,120,000, most of them (3,824,000 trees) being in Pemba and the rest (1,296,000 trees) in Unguja. It is estimated that between 1990/1991 and 1999/2000, Zanzibar had a clove tree population of only 2,055,495, a decline of 60 per cent from its 1950/1951 position. Related to the decrease in tree population is the decline in clove output, from an average of 12,408 tons during the 1950/1951–1959/1960 period to an average of 4,805 tons in the 1990/1991–1999/2000 period (Economic Research Bureau 2003: 30). The figures for 2009 indicate a tonnage of cloves and clove stems below 4,000 tons (Office of the Chief Government Statistician 2010: table 2.4.1).

In the mid-19th century, Zanzibar was responsible for more than 90 per cent of the production of cloves. Today that figure is closer to 12 per cent. As is indicated

below, various market factors have resulted in this decline and the development of GIs is part of the strategy to arrest this decline.

Product definition

There are three major clove products, which are of commercial importance:

Whole or ground clove buds;
oleoresin, which is prepared from ground cloves; and
clove oils, which are extracted from either the buds, the stems or the leaves.

Whole or ground cloves are mostly used in the household sector. The most common uses include: (i) as an essential ingredient in the preparation of betel-nut chew; (ii) use in food preparation in oriental countries as an essential ingredient in the preparation of mixed spices and in the manufacture of curry powder; (iii) use in Western households in various meat dishes, sauces and pickles, in desserts and in beverages and in Nordic countries and Germany for baking in preparing Christmas cakes and hot wine punch (Glogg); medicinal use for stimulating digestion, checking nausea and vomiting and for treatment of colds and sore throat and as a tonic and antiseptic and to prevent teeth decay; and (iv) cloves are used in Indonesia in the manufacture of clove-flavoured cigarettes, called kretek, which contain two parts tobacco and one part cloves.¹ This type and level of production requires approximately half of the world production of cloves and its use in kretek cigarettes dictates the daily price of cloves.

Oleoresin of cloves is used in the food flavouring industry in the preparation of meat products, pickles, table sauces and in the preparation of fruit puddings.

The presence of essential oils is determined by the availability of eugenol (volatile oils) found in the clove buds, clove stems and clove leaves. This oil varies to a certain extent between products depending on the geographical area it has been produced, the grade of the clove and the storage conditions of the clove. Clove oil is used: (i) in the spice, perfumery and flavouring industries; (ii) in the pharmaceutical industries as a carminative and antispasmodic; in the dental field, where it is mixed with zinc oxide for making temporary fillings for cavities; in the preparation of medicinal products such as cough remedies, lozenges, etc.; and in the manufacture of soap, toothpaste and detergents.

Distinctive features of Zanzibar cloves

To underpin the GIs protection of Zanzibar cloves, a number of unique features of those cloves were identified by stakeholders. These include:

Distinctive aroma: The Zanzibar clove has a unique aroma compared with the clove products of other countries, which makes it particularly appealing to consumers using the clove in cooking and for the production of essential oils.

Unique flavour: The Zanzibar clove is described as 'bitter sweet' in the sense that compared with other cloves, it is neither too bitter nor too sweet, which enhances its appeal for use in cooking.

Attractive appearance: The brown reddish colour of the Zanzibar clove makes it particularly appealing to the Indian spice market.

Distinctive size: Unlike clove products of other countries, which are thicker, the Zanzibar clove is more slender, enhancing its appeal to consumers, particularly for use in cooking.

Organically produced: Zanzibar clove producers do not use chemicals, fertilizers and pesticides. This enhances their appeal for the growing international market for organic products.

Low oil content: Zanzibar cloves are considered to be particularly suitable for the production of kreteks (clove cigarettes) because of their low oil content, compared with cloves from other countries. By comparison, the Indonesian clove was identified as having a high oil content, which causes blemishes on the cigarette rolling papers and affects consumer appeal.

The supply market

Zanzibar's economy is based primarily on the production of cloves (90 per cent grown on the island of Pemba). Clove exports account for up to 70 per cent of Zanzibar's export earnings. Until the beginning of the 19th century, the Moluccas was the major producer of cloves. The entry of Zanzibar in the world clove market in the 1830s transferred the market dominance of the Moluccas to Zanzibar. In 1834, Zanzibar produced 35,000 metric tons of cloves and controlled 90 per cent of the world market. This virtual monopoly of the world clove market by Zanzibar continued until the 1940s. Thereafter Indonesia regained its lead in the world clove market both as a producer and importer. This was mainly attributable to the Indonesian demand for locally produced kretek cigarettes.

Clove production in Zanzibar has fluctuated over the past 30 years. In the best years the price of cloves reached US\$9,000 a ton. With the entry to the market of other spice-producing countries a glut in production reduced prices to less than US \$2,000 a ton in 2002. The fall in price was accompanied by a steep drop in production in Zanzibar to below 50 tons in the 1999 crop season against a high of 24,200 tons in 1958. It is estimated that there is an illicit export trade in smuggled cloves of around 5 per cent depending upon available prices.

Currently the major producers of cloves are: Indonesia, Madagascar, Zanzibar, Comoros, Sri Lanka and Brazil. Indonesia produces between 80,000 and 120,000 tons of cloves that are mostly consumed domestically. Zanzibar, Madagascar and Indonesia account for more than 90 per cent of the world output. World demand for cloves, excluding Indonesia, stands at about 10,500 tons. Other producers include Nigeria, Malaysia, Reunion and Seychelles. Production data for these countries is not readily available. Brazil and Sri Lanka are upcoming competitors in the world market for cloves. Sri Lanka has been producing cloves for a long period of time though in

negligible quantities. Another small participant in the world market of cloves is Comoro. This country has been exporter of cloves for a long time but the exports have not exceeded 2,000 tons.

Indonesia and Malaysia have been exporting cloves but their exports have been relatively small because of domestic demand for the commodity.

There is product differentiation between the cloves supplied by the different producers. Cloves, which are produced by Indonesia, Malaysia and Sri Lanka, are said to be closely comparable and are substitutable. They are the most suitable for culinary use and fetch the highest prices in the market. These cloves have a global market. The Indonesian market is primarily for cloves used in the manufacturing of kretek cigarettes. These are sourced from Zanzibar and Madagascar.

Production of Zanzibar's cloves

Pursuant to agricultural reforms in the 1960s, most cloves are grown either on 3ha farms by private farmers or on land rented from the government. Farming is organized according to local government structures. Farmers are grouped into Shehias comprising 20–25 farms. There are some 236 Shehias which are grouped into ten districts, which in turn are grouped into five regions. The Zanzibar Clove Producers Organisation (ZAPCO), which has branches in Pemba and Unguja, is organized on a Shehia and district basis. Currently ZAPCO provides clove husbandry advice to farmers and distributes tree seedlings. It is concerned to promote the quality of clove production and could thus also be deployed into GI certification with the appropriate capacity building.

Marketing of Zanzibar's cloves

All of the cloves produced in Zanzibar and Pemba are acquired under legislation, by the State Trading Corporation (ZSTC), which is owned by the Revolutionary Government of Zanzibar. The ZSTC was established by the Government of Zanzibar Decree No. 1 of 1966. It has monopolistic powers over the acquisition of and internal and external marketing of cloves. About 50 per cent of the profits accruing to ZSTC from the marketing of cloves to the external markets are appropriated by the RGZ. The ZSTC pays a price to growers which it sets and which is calculated after the government has received its share and ZSTC overheads are deducted. The ZSTC supplies almost all of the cloves that it acquires to three purchasers, two in the Netherlands and one in Singapore. It engages in no promotional or marketing activities in external markets, preferring to rely on the assured purchases of its few customers. With this current supply system, it cannot see the point in promoting GIs, as its few customers will purchase all of its stock in the absence of any promotional activity by it. On the other hand, it has to accept the prices which its customers are prepared to pay and this has tended to be a low and wildly fluctuating price.

The principal purchasers of cloves in 2009 were India (1,225 tons), Singapore (1,272 tons), UAE (327 tons) and Hong Kong (643 tons) (Office of the Chief Government Statistician 2010: table 2.4.1).

There is a very significant trade in smuggled cloves that are sold to purchasers in Mombasa (Kenya), who generally pay growers significantly above the ZSTC price. The ZSTC pointed out that this trade in smuggled cloves could undermine a GIs system because the producers supplying smugglers are not very particular about the quality of the cloves that they supply. Shipments have been intercepted with adulterating additives, used to add bulk to cargoes. An obvious solution to the smuggling problem is for the incentive for smuggling to be removed by the payment of higher prices to Zanzibar farmers. This is only possible by the removal of the drain on revenues by the ZSTC and by the shifting of clove marketing to the private sector that, through appropriate branding and promotion strategies, should be able to secure a much better price through directly marketing into consuming markets than ZSTC receives from its existing customers.

Export earnings

The most determining factor in clove exports is the price of cloves in world markets. These have fluctuated significantly between 1980 and 2001. During the 1990/1991 crop season, the fob price of a ton of clove was US\$1,800 but declined by more than 60 per cent to US \$700 per ton during the following 1991/1992 season and further to between US\$600 and \$700 in the 1992/1993 season. World market prices for cloves peaked at between US \$5,000 and \$5,500 during the 2000/2001 season, partly due to political and social unrest in Indonesia. By the 2001/2002 crop season, world market prices for cloves had declined to between US\$2,000 and \$3,000. The wide fluctuations in the price of cloves in world markets have had a significant impact upon the willingness of farmers to cultivate the crop and the fluctuations have an obvious impact upon on the economy of Zanzibar.

Reform proposals

The precipitous decline in Zanzibar's clove production and sales has been attributed to a variety of factors, including: (i) increased competition, particularly from Indonesia which now supplies 75 per cent of the world's cloves compared with Zanzibar's 7 per cent; (ii) the effects of the attempt by the Tanzanian Government in the 1960s and 1970s to control clove prices; (iii) the monopoly control over the marketing of Zanzibar's cloves production by the Zanzibar State Trading Corporation (ZSTC), which is owned by the Revolutionary Government of Zanzibar (RGZ); (iv) fluctuations in world market prices; (v) declining population of trees and poor tree husbandry; and (vi) cost-ineffective marketing structures.

In 2002, the RGZ commissioned a report on how the clove industry could be revitalized (Economic Research Bureau 2003). The report noted that 'agricultural marketing services are disorganized and uncoordinated, poorly served by infrastructure and riddled with cumbersome export procedures' (Economic Research Bureau 2003: para 4.5). The report refers to the new agricultural policy of the RGZ to:

- (i) provide an enabling environment for private sector participation in the trade and marketing of all agricultural commodities;
- (ii) improve market infrastructure for both internal and external markets;

- (iii) streamline export procedures that will encourage and promote increased exports of agricultural commodities; and
- (iv) formulate regulations and guidelines that will govern wholesale and retail markets for agricultural commodities (Economic Research Bureau 2003: para 4.5).

Acknowledging the problems caused by a fluctuating output because of the cyclical nature of the crop, and the insecurity of the land tenure system and the necessity to improve the delivery of research and extension services, the new agricultural policy of the RGZ set out two objectives:

- (i) to improve the performance and increase efficiency on clove trade and marketing; and
- (ii) to increase the contribution of cloves to the national economy by improving exports of quality cloves (Economic Research Bureau 2003: para 4.6.4).

The principal matter addressed by the report is whether the attainment of these objectives was dependent upon the introduction of a greater degree of private sector participation in the marketing of cloves (Economic Research Bureau 2003: para 5.4). The report concluded that the liberalization of the marketing of cloves was the preferred option (Economic Research Bureau 2003: para 7.7.1). In 2007, the Zanzibar House of Representatives decided that the clove industry should be privatized.

The report makes no reference to the improvement of trade promotion techniques, although it concedes that the 'marketing of cloves as is currently carried out in Zanzibar has not sufficiently demonstrated the attributes of an economy facing the realities of a fast globalizing world' (Economic Research Bureau 2003: para 7.1.4). Reliance has been mostly on traditional clove markets, mainly in the Far East, and has depended heavily on exports of whole cloves, which has had limited success in marketing processed cloves to outside markets and, relevant to GIs protection, has not undertaken serious clove promotion exercises in world markets. It has to be acknowledged that the report predates by five years the promulgation of the Zanzibar Industrial Property Act 2008, which provided for the registration of GIs. It should also be noted that the new agricultural policy of the RGZ includes a range of instruments that could embrace GIs protection. These include the promotion of farmers' associations and encouraging private sector participation in agricultural production, processing and the provision of marketing services. Specifically in the new agricultural policy the RGZ intends to 'provide an enabling environment for private sector participation in the trade and marketing of all agricultural commodities'.

As in mainland Tanzania, Zanzibar has its long-term development strategy, Vision 2020. It has also formulated its Poverty Reduction Strategy Paper and the Agricultural Sector Policy. In all these documents the role of the agriculture sector in general, and the clove industry in particular, is recognized. With specific reference to the clove industry in Zanzibar, the vision envisages, *inter alia*, the development of an enabling environment for gradual shift towards private sector participation in the industry and the development of a 'smart' partnership between the government and the private sector especially in clove marketing aiming at a 'win-win' situation. The development of a

marketing strategy supported by appropriate GIs would be consonant with this vision. Indeed, Rashid Ali Saleed from Zanzibar's Ministry of Trade, Industry and Marketing was reported as saying that 'branding Zanzibar's cloves similar to the way France brands its champagne might help the industry survive' (Curnow 2010).

At the moment, the ZSTC, which is the sole acquirer of cloves in Zanzibar and Pemba and which supplies to its purchasers in the Netherlands and Singapore, has no plans to engage in any promotional activities. It envisages its future role as that of a purchaser in the last resort to maintain a floor price for cloves.

In the event that the market for the acquisition and supply of cloves is privatized, then the use of GIs as a promotional tool becomes feasible.

Privatization of the Zanzibar cloves industry

The 2003 report on the revitalization of the clove industry recommended a gradual and partial privatization of the clove industry, predicated on the existence of clove farmers associations and a responsible private sector (Economic Research Bureau 2003). It is envisaged that, in the first instance, the ZSTC will be transformed into a Zanzibar Clove Board (ZCB). In addition to maintaining a floor price for cloves by being a buyer in the last resort, the main functions of the ZCB will be:

- to regulate and control the quality and marketing of cloves;
- to advise the government on all matters relating to clove production and marketing and to collect and disseminate all information concerning cloves and promote its use, development and improvement of the clove industry;
- to carry out such other functions in relation to clove industry as the Minister may direct from time to time, such as market research, quality improvement, production of oils, etc.;
- to promote the establishment of association of stakeholders, such as the Clove Growers Association, which will give members higher bargaining power with the private traders; and
- to promote funding for research on cloves and markets.

It is envisaged that the ZCB will issue licences to exporters who have to establish an accepted level of performance bond before being licensed. This will include the use of acceptable packing materials and storage practices. It is proposed that the ZCB together with the Ministry of Agriculture will check the quality of the cloves which are produced and sold.

An additional function for the ZCB could be its ownership of a cloves GI and its supervision of adherence to certification requirements.

Other potential GIs in Zanzibar

In December 2009, the ZRG announced the 'Zanzibar Agricultural Transformation Initiative' (ATI), which prioritizes agricultural development as crucial means for

socioeconomic transformation of the isles. This is underpinned by the overarching policy frameworks, outlined in the Zanzibar Development Vision 2020 and the Zanzibar Agricultural Sector Strategic Plan (SP), which advocate both food self-sufficiency and commercialization through the transformation and modernization of the agriculture sector. The ATI identified that opportunities exist for the production and export of spices such as black pepper, cinnamon, ginger, mango, turmeric vanilla, kichaa chilli and cash crops; including fruits such as mangoes and papayas; spices, seaweed and other marine products.² In each of these cases the promotion of local production through GIs is a possibility.

Part of the ATI strategy involves the promotion of the development of value chains of a few selected high-value commodities based on comparative advantage, farmer preference and market demand through: (i) transformation of subsistence smallholder farming into viable commercial production units that are feasible for private sector investment (service provision, market access); (ii) promoting adequate utilization of productive land and industrial resources through joint venture schemes (medium to large-scale firms) for increasing employment and agricultural output; and (iii) enhanced investment in identified priorities areas to increase agricultural output. Not addressed in the ATI is the ways in which potential exports might be promoted. The role of GIs in this regard needs to be considered.

A 2010 Report by the Commission for Zanzibar Tourism on *Branding of Zanzibar Local Products* identifies the fact that spices in all production areas in Zanzibar are produced organically provides a marketing possibility for the spices by exporting them under both the organic and fair trade products label, which should obtain better prices. Not considered in the report is the way that this organic feature could also be promoted through GIs.

Bungo fruit

One unique possibility for GIs protection, identified by various informants, is the Bungo fruit, which is endemic to Zanzibar and Pemba. It is currently consumed as a fruit, but is also used as a juice that has a taste somewhere between a mango, an orange and a pineapple. At the moment, all consumption is within Tanzania or within Tanzanian expatriate communities, but the possibility of exporting the juice is mentioned by stakeholders.

Seaweed

In Zanzibar, seaweed farming started in 1989 when private entrepreneurs established commercial farms using imported strains from the Philippines. The most widely cultivated species of seaweed in Zanzibar is *Spinosum* that fetches a low market price. A recently introduced species, *Cotonnii*, fetches a much higher market price but it is more difficult to cultivate. It is estimated that more than 22,000 people are involved in seaweed farming on the islands of Zanzibar. It grows between 7,000 to 9,000 tons of dry seaweed annually. Harvesting of seaweed takes place approximately eight

weeks after planting. Once the product has been harvested and put in storage, the buying agents take the responsibility of assessing the quality and paying the farmers. The ZRG is providing extension services to the farmers to enhance production, productivity and quality. The entire seaweed production is exported in its raw form, there is no domestic market. The development of a GI provides the possibility of some value-addition.

Potential GIs in mainland Tanzania

Agribusiness is still in its infancy in Tanzania and commercial ventures are found mostly in traditional export crops such as coffee, tea, cotton, cashews, tobacco and, on a much smaller scale, cloves and sisal. Recently Tanzania's most important non-traditional agricultural export has become fish and fish products, which earned half as much as all traditional agricultural exports in 2006 (US\$138.6 million).

The OECD has pointed out that higher food prices, driven by higher energy costs and rising consumption in developing countries, provide Tanzania with ample opportunities to develop its agro-industry to tap into regional markets (OECD 2008). Food exports are a promising option for Tanzania which shares borders with eight African countries. However, Tanzania has not taken advantage of its agribusiness opportunities and is in fact an importer of agricultural foods. Since the 1999/2000 season, the Food Self Sufficiency Ratio (SSR), which compares the volume of domestic food production against the food requirements of the country's population, has fluctuated between a low of 88 per cent (2003/2004) and a high of 112 per cent (2006/2007) (OECD 2008). While arable land is estimated at 44 million hectares, only about 10 million hectares (23 per cent) are currently under cultivation. Food production remains dominated by smallholders whose productivity is low. The average food crop productivity in Tanzania is estimated at 1.7 tonnes per hectare, whereas with good management and optimal fertilizer use, yields of 3.5–4 tonnes per hectare would be expected. However, only 15 per cent of all farmers use fertilizers. The OECD reports that the difficulty of Tanzanian agribusinesses in obtaining finance to buy productivity-enhancing inputs, such as seeds, fertilizers, chemicals and pesticides, or intensification technologies, is a particular difficulty and only 3 per cent of agricultural households have access to credit. Another problem is the lack of processing and preservation facilities that causes wastage of around one half of the fresh fruit and vegetables grown in Tanzania.

An obstacle to the possibility of developing agricultural exports that can be supported by promotional mechanisms such as GIs is that smallholder farmers in Tanzania have been identified as preferring to maximize food self-sufficiency instead of their profits (Temu and Marwa 2007). Incentives to produce food crops for the market are not in place. In Tanzania, the average plot size currently ranges from 0.9ha to 3ha. Diversification into high-value products, such as horticulture, can be pursued by organizing smallholder farmers into larger groups, such as associations or cooperatives. GIs can be used as a brand to underpin this form of organization for high-value crops such as coffee and cashews.

The 2006 Agricultural Sector Review in Tanzania identified several areas where opportunities for diversification might exist mainly in the horticultural sector. The government undertook a general feasibility review for horticultural products across five agro-climatic zones in Tanzania (PASS 2008). Significant opportunities for export of high-value agricultural products such as fresh fruit and vegetables exists particularly because Tanzania has preferential access to key European and North American markets under such arrangements such as the EU's General System of Preferences (GSP) and Everything But Arms (EBA), and the United States' Africa Growth Opportunities Act (AGOA).

In the mid-1980s, a cut-rose industry was established, followed by the development of a cuttings industry based on chrysanthemums. More recently, there have been specialized investments in the propagation of hybrid vegetable seeds, higher-value fruits and cut-flowers other than roses. Currently exports of horticultural products from the country around US\$340 million with a growth rate of 8–10 per cent per annum. Floricultural exports account for more than 50 per cent of annual exports.

Tanzania's horticultural sector (vegetables, fruits and cut flowers) is still very small and contributes little more than 1 per cent to total merchandise exports (Wolter 2008). Tanzania's horticultural products are exported to more than 11 African destinations including Rwanda, Democratic Republic of Congo, Kenya, Zambia, Malawi, Uganda, Mozambique, South Africa, Comoros Islands, Swaziland and Angola. Some specialized local markets have developed. For example, 50 per cent of onions consumed in Kenya come from Tanzania with eight out of every ten tons of onions sold in the Wakulima market in Nairobi having their origin in Tanzania. Thirty per cent of its annual production of 130,000 tons of tomatoes is sold to Kenya, Malawi and Comoros. Of the 160,000 tons of oranges, more than 85,000 tons is sold in the Kenyan markets.

It has been pointed out that Tanzania's participation in regional horticultural trade is faced with quite a number of challenges (Wolter 2008). A large part of horticultural regional trade is still informal. Dominated by middlemen, the trade suffers from price fluctuations mainly attributed to the interests of the middlemen and the dominance of the regional markets by cartels of brokers. In some cases, for example, onions, tomatoes and oranges, the middlemen buy the produce at the farmgate, leaving farmers with minimal margins. There is still very little information available in Tanzania and no central organization providing information on the horticultural industry. Fostering the development of farmers' cooperatives would help smallholder farmers compete with large exporters and they could also serve as an important vehicle for sharing knowledge and learning among smallholder farmers. In the event that horticultural collectives are organized to promote Tanzanian products through appropriate GIs, an information capacity will be able to be established.

Success in export-oriented horticulture depends on the knowledge and technical preparedness to adopt production and marketing strategies that will make Tanzanian producers competitive. Both governmental and non-governmental institutions must cooperate to develop policies, frameworks and tools that raise smallholder farmers' level of understanding on technical requirements and other standards for horticultural

exports (Rutasitara and Mtatifikolo 2009). This could include the marketing of horticultural products underpinned by GIs.

An agricultural product of which Tanzania was once the largest world producer is sisal. In 1964, sisal was the largest foreign exchange export earner for Tanzania. By 1998, Tanzania's share of the world market was less than 10 per cent. The Government of Tanzania has indicated that it intends to revive the industry and to restore Tanzania's reputation as the producer of sisal of the highest quality.³ This programme to revive the industry could also be underpinned by a suitable GI.

Notes

- 1 Clove kretek cigarette smoking is predominant in Indonesia but there are also smokers in the US and in some Latin American countries.
- 2 RGZ, Zanzibar Agricultural Transformation for Sustainable Development, 2010–2020, *For Agricultural Productivity, Food Security and Sustainable Livelihood*, 19 December 2009.
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